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The Islamic Rule of Lenity: Judicial Discretion and Legal Canons

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The Islamic Rule of Lenity: Judicial Discretion and Legal Canons

*Intisar A. Rabb**

ABSTRACT

This Article explores an area of close parallel between legal doctrines in the contexts of Islamic law and American legal theory. In criminal law, both traditions espouse a type of “rule of lenity”—that curious common law rule that instructs judges not to impose criminal sanctions in cases of doubt. The rule is curious because criminal law is a peremptory expression of legislative will. However, the rule of lenity would seem to encourage courts to disregard one of the most fundamental principles of Islamic and American legislation and adjudication: judicial deference to legislative supremacy. In the Islamic context, such a rule would be even more curious, allowing Muslim judges to disregard a deference rule even more entrenched than the American one: a divine legislative supremacy to which judicial deference should be absolute. Yet, there is an “Islamic rule of lenity” that pervades Islamic criminal law. This Article examines the operation of and justifications for the lenity rule in the American and Islamic contexts against the backdrop of theories of law and legislative supremacy that underlie both. In both contexts, the lenity rule acts serves to expand the operation of judicial discretion. But whereas the use of American lenity is fraught and limited, Islamic lenity is relatively uncontroversial and expansive. With the Islamic rule of lenity, we see both stronger legislative supremacy doctrines and more assertions (albeit hidden) of judicial authority to legislate. An examination of the role of lenity in Islamic law with respect to American law explains differences in the scope and exercise of judicial discretion in

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each legal system. It can also lead us to reconsider common public law theories that characterize rules of deference to doctrines of legislative supremacy and nondelegation as a constraint on judicial discretion.

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I. INTRODUCTION

With new questions surrounding Islamic law in American and global contexts comes an urgent need to understand *shari'a*, particularly Islamic criminal law, where the stakes are high and its landscape appears ruggedly harsh. In foreign constitutional contexts, Islamic law has reemerged globally with over twenty-six countries adopting constitutions with a clause declaring Islamic law to be a source of state law.¹ Issues of Islamic law—in particular, punishments for adultery, apostasy, and blasphemy—frequently appear in U.S. newspapers with important implications for American and international law and policy. Such issues have even found a way into American electoral politics, as presidential candidates speak against the “threat of a *shari'a*-takeover” of American courts,² and several state legislatures have considered bills seeking to “ban *shari'a*.”³

1. For an insightful view, placing the phenomenon in comparative context, see RAN HIRSCHL, *TOWARD JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 1 (2004) (describing the rise of constitutional drafting and reform in over eighty countries, including many in the Muslim world, giving rise to rising judicial power over definitions of law). The constitutional status of Islamic law is an issue of pending debate in Libya, Tunisia, and elsewhere in the aftermath of the 2011 Arab Spring.

2. As early as the Summer of 2010, then-presidential hopeful Newt Gingrich called for a national debate on *shari'a* and a federal law prohibiting its citation. Newt Gingrich, *America at Risk: Camus, National Security and Afghanistan*, Keynote Address to American Enterprise Institute 7–8 (July 29, 2010), available at <http://www.aei.org/video/101267>.

3. One state passed a constitutional amendment, Oklahoma State Question 755, by a 70 percent majority in a November 2010 referendum, prohibiting the citation of *shari'a* and foreign law. U.S. District Judge Vicki Miles-LaGrange issued a preliminary injunction blocking the new law after a challenge by a Muslim plaintiff on First Amendment grounds, and the case is currently on appeal before the U.S. Court of Appeals for the Tenth Circuit. See *Awad v. Ziriax*, 754 F. Supp. 2d 1298, 1307–08 (W.D. Okla. 2010) (issuing preliminary injunction upon finding “that the weighing of the harms involved in this case clearly would favor protecting plaintiff’s *First Amendment* rights over the will of the voters.”), *appeal docketed*, No. 10-6273 (10th Cir. argued Sept. 12, 2011). Three states have passed bills that would prohibit the citation and/or practice of any form of *shari'a*. LA. REV. STAT. ANN. § 9:6001 (2011) (S.B. 460 (La. 2010)); H.B. 785 (La. 2010), *adopted as* Act No. 886 (passed June 29, 2010, effective Aug. 15, 2010); TENN. CODE ANN. § 20-15-103 (2011) (May 27, 2010); see also S.B. 510, 1st Reg. Sess. (Ind. 2011) (pending legislative action). Almost two dozen states have proposed legislation or constitutional amendments to the same effect, including Oklahoma in the wake of challenges to its proposed constitutional amendment. S.B. 62 (Ala. 2011) (constitutional amendment); H.B. 88, 27th Leg., 1st Reg. Sess. (Alaska 2011) (constitutional amendment, introduced Jan. 11, 2011); S.C.R. 1010, 50th Leg., 1st Reg. Sess. (Ariz. 2011) (introduced Jan. 14, 2011); H.C.R. 2033 (Ariz. 2011) (same); S.B. 97, 88th Gen. Assemb., Reg. Sess. (Ark. 2011) (introduced Jan. 20, 2011, amended Feb. 1, 2011); S.J.R. 10 (Ark. 2011) (constitutional amendment); H.B. 45, 151st Gen. Assemb., 2011–2012 Reg. Sess. (Ga. 2011) (introduced Jan. 24, 2011); S.B. 51 (Ga. 2011); H.C.R. 44 (Idaho 2010) (filed Feb. 17, 2010, adopted Mar. 29, 2010) (non-binding

In earlier American legal history, judicial depictions of Islamic law have featured a system rife with either caprice or cruelty. In terms of caprice, U.S. Supreme Court portraits have typically followed from the famous account of Max Weber,⁴ describing a traditional *qāḍī* (judge) under a tree, whimsically dispensing justice.⁵ As for cruelty, another common view imagines Islamic law to be a religious code that adherents perceive as descended from on high, expressing the will of an angry and intolerant God intent on amputating hands and executing apostates.⁶ In the first picture, the law is wholly unknown outside of the *qāḍī*'s own mind, and in the second, it is crystal clear and relentlessly harsh.

Existing scholarship in comparative law and public law theory typically offers no better way to understand the legal interpretative process in Islamic law than the seductively simple depictions of the Weberian *qāḍī* or his draconian counterpart. The critical insight

resolution); S.J.R. 16, 117th Gen. Assemb., First Reg. Sess. (Ind. 2011) (constitutional amendment, introduced Jan. 18, 2011); H.B. 1078 (Ind. 2011); S.B. 520 (Ind. 2011); H.F. 489 (Iowa 2011); H.F. 575 (Iowa 2011); H.J.R. 14 (Iowa 2011) (constitutional amendment); H.B. 2087, 84th Leg., 2011 Reg. Sess. (Kan. 2011) (introduced Jan. 31, 2011); H.B. 301 (Miss. 2011); H.J.R. 31, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011) (constitutional amendment, introduced Feb. 24, 2011); S.B. 308 (Mo. 2011); H.B. 708 (Mo. 2011); H.B. 768 (Mo. 2011); L.B. 647, 102nd Leg., 1st Reg. Sess. (Neb. 2011) (introduced Jan. 19, 2011); A.B. 3496, § 3.b, 214th Leg. (N.J. 2010); H.B. 1552, 53rd Leg., 1st Sess. (Okla. 2011) (introduced Feb. 7, 2011); H.J.R. 1056 (Okla. 2011) (constitutional amendment); H. 3490, S.C. Gen. Assemb., 119th Sess. (S.C. 2011) (introduced Jan. 27, 2011); S. 444 (S.C. 2011); S.B. 201 (S.D. 2011); H.B. 911, 82d Leg., Reg. Sess. (Tex. 2011) (introduced Jan. 26, 2011); H.B. 3027 (Tex. 2011); H.J.R. 8, 61st Leg., 2011 Gen. Sess., (Wyo. 2011) (constitutional amendment, introduced Jan. 19, 2011). And three similar measures have failed to pass. S.B. 1962, 112th Reg. Sess. (Fla. 2010) (introduced Mar. 2, 2010; failed Apr. 30, 2010); S.B. 1294 (Fla. 2011); H.B. 1273 (Fla. 2011); H.B. 301, 2011 Reg. Sess. (Miss. 2011) (introduced Jan. 4, 2011; failed Feb. 1, 2011); Utah H.B. 296 1st Sub. (Utah 2010) (introduced 2010; withdrawn Feb. 2011); cf. Aaron Fellmeth, *International Law and Foreign Laws in the US. State Legislatures*, 15 ASIL INSIGHTS (May 26, 2011), <http://www.asil.org/pdfs/insights/insight110526.pdf> (discussing cases and legislation); Carlos M. Vasquez, *Customary International Law as U.S. Law: A Critique of the Revisionist and Intermediate Positions and a Defense of the Modern Position*, 86 NOTRE DAME L. REV. 101, 102–03 nn.1–4 (2011) (discussing implications of state legislation “exclud[ing] Sharia law” and other foreign laws as a method of state regulation of international law).

4. See MAX WEBER, 2 *ECONOMY AND SOCIETY* 895, 976 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., Bedminster Press 1968) (1922) (“Kadi-justice (*Urteilsgrunde*) knows no rational ‘rules of decision’ whatsoever . . .”).

5. See, e.g., *Terminiello v. Chicago*, 337 U.S. 1, 11 (1949) (Frankfurter, J., dissenting) (“We do not sit like a kadi under a tree dispensing justice according to considerations of individual expediency.”). For additional citations of “*qāḍī* justice” as arbitrary decision-making in state and federal court opinions, see Asifa Quraishi, *On Fallibility and Finality: Why Thinking Like a Qadi Helps Me Understand American Law*, 2009 MICH. ST. L. REV. 339, 339 nn.1–2 (collecting cases).

6. For early American judicial views of Islamic law in federal courts, see the survey by Marie Failinger, *Islam in the Mind of American Courts: 1800–1960*, B.C. THIRD WORLD L.J. (forthcoming 2012) (“American judges’ references to Islam display little evidence of familiarity with Islamic law or the Muslim faith.”).

missing is an account that reveals the workings of Islamic law as it functioned historically, especially in the high-stakes field of criminal law.⁷ Focusing on that arena, it is worth directing attention to the underappreciated area of legal canons like lenity, which turn out to be central to interpretive processes in both Islamic and American-common law legal systems and to closely reflect the public law structural considerations in each. Historically, through the use of certain legal canons—judge-made principles of legal interpretation common to many legal traditions—Muslim jurists developed a highly sophisticated and internally regulated method for adjusting *shari'ā* to changing social contexts in a way that reflected the politico-legal institutional architecture and core substantive values of their societies and times. The medieval Muslim jurists' process of appealing to these legal canons was comparable, I argue, to analogous phenomena at common law. The aim of this Article is to provide a historical and comparative account of the legal and social logic of interpretation of criminal law in American and Islamic contexts. This account of legal processes in criminal law can usefully inform our understanding of the judicial power and separation of powers concerns in comparative public law theory.

For this purpose, I trace the function of a criminal law canon akin to the common law "rule of lenity," a principle of narrow construction for ambiguous penal statutes.⁸ The American rule directs judges not to impose criminal sanctions whenever they have doubts about the applicability of the law to a set of facts at hand.⁹ In early Islamic contexts, judges invoked a similar principle, the "*ḥudūd* maxim," which also directs courts not to apply Islam's fixed criminal sanctions (*ḥudūd*) in cases of doubt.¹⁰ Examined together, it becomes clear that judges deployed legal canons to translate "legislation" to

7. For definitions and the significance of notions of cruelty regarding punitive practices in criminal law, see Paulo Barrozo, *Punishing Cruelly: Punishment, Cruelty, Mercy*, 2 CRIM. L. & PHIL. 67 (2008).

8. *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) ("The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself.").

9. See WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* app. B, at 23 (3d ed. 2001) (defining the rule of lenity as the legal maxim "against applying punitive sanctions if there is ambiguity as to underlying criminal liability or criminal penalty").

10. I use "courts" to refer to the body of jurists that claims authority to "say what the law is." This refers to the judicial power of Article III courts in the American context. See U.S. CONST. art. III; see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (defining the constitutional scope of the American judiciary). There is a similar concept of judicial power in the classical Islamic legal context. See CHIBLI MALLAT, *THE RENEWAL OF ISLAMIC LAW* 79 (1993) (applying the *Marbury* phrase, defining the judges charge to "say what the law is," to jurists in the Islamic context). For further discussion of juristic authority and process, see Intisar A. Rabb, *We the Jurists: Islamic Constitutionalism in Iraq*, 10 U. PA. J. CONST. L. 527, 542–47 (2008). In this sense, I use courts and (American) judges or (Muslim) jurists interchangeably.

on-the-ground decisions in both contexts, and that canons played similar roles to differing effects in the theory and applications of law in each tradition.

For comparative purposes, a central aim has been to investigate the role canons play in legal interpretative processes and what that reflects about the scope of adjudicative choice and judicial power in regimes that have strong notions of legislative supremacy. The historical and judicial records provide evidence that canons like lenity often reflect not only constitutional structural norms, but also core values in each system.¹¹ The point is not to suggest any perfect parallel or agreement on the content of the public values expressed by these constitutional texts, but to indicate how judges deploy legal canons like lenity to uphold core values of their respective legal systems. While there are certainly notable divergences between the modern Anglo-American common law contexts and the premodern Islamic one, the sources show a surprising degree of overlap in applications of lenity within the confines of the ideals of legislative supremacy and other constitutional commitments. This insight can provide a useful starting point for further studies as to how American legal scholars might better understand how separation of powers concerns relate to constitutional and statutory interpretation decisions.

My argument proceeds in three parts. Part II lays out the typical justifications for the American rule of lenity as a principle of constitutional structure. Once a doctrine of judicial discretion, prominent American scholars and jurists have come to view lenity as the “new nondelegation doctrine,”—one embodiment of the principle cautioning courts to defer to legislative supremacy. While other justifications exist, this structural view of lenity has become dominant amongst the most ardent proponents of lenity both in the courtroom and in the classroom. Part III turns to explore structural aspects of classical Islamic law that often produce an even higher premium on legislative supremacy for the criminal law than the American context. Part IV queries how the *hudūd* maxim (the “Islamic rule of lenity”) operated against that structural backdrop. It contrasts structural arguments with equitable ones to show ways in which the maxim largely reflected the substantive moral commitments of the Islamic legal system as Muslim jurists understood them to exist in Islam’s fundamental or “constitutional” legal texts. Muslim jurists’ lenity jurisprudence displays their

11. The case has already been made for the American system. See William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1091 (1989) (observing that American legal maxims reflect “public values” drawn from the Constitution, federal statutes and, common law); Cass Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 505 (1989) (defending legal canons as representative of public values).

emphasis on ideals of equity and fairness above rigid definitions of legislative supremacy, though—to be sure—there were limits to how far they would emphasize equitable above textual principles when they saw a threat to sensitive social or moral values. Appeals to equity and fairness through lenity principles reveal the extent to which judges in each system understand the extent of adjudicative choice with respect to distinctive structural features and value commitments.

II. AMERICAN LENITY AS A RULE OF STRUCTURE

The rule of lenity has become the latest, greatest expression of the dual doctrine of legislative supremacy and nondelegation—the latter being the American rule that legislatures are to make the law without delegating that task to any other branch. These doctrines carry particular weight in criminal law. Recognition of the high stakes of criminal punishment—among them, the potential loss of life, liberty, or wealth—have long undergirded the importance of allowing the legislature, as a democratically elected body, to make criminal law.¹² In this sense, one view of American lenity is that it vindicates structural concerns of the U.S. Constitution, designed to maintain a clear separation between legislative and judicial powers. Following that line of thought, we might—as some scholars have posited—think lenity to be a uniquely American phenomenon, best described as an American principle born of our constitutional structure. While that would be a narrow view of lenity, a structuralist view of the doctrine is worth exploring, as it drives the interpretative scheme of lenity proponents and provides in exploring the lenity analog in the Islamic context—where structural concerns are similar (if more exaggerated). Before turning to situate the Islamic context against this one, we explore the American structural arguments for lenity as a rule of legislative supremacy and nondelegation.

12. *United States v. Bass*, 404 U.S. 336, 348 (1971) (“Because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community . . . legislatures and not courts should define criminal activity.”).

A. Lenity as Nondelegation¹³

Article 1, Section 1 of the U.S. Constitution declares that, "All legislative power herein shall be vested in a Congress of the United States."¹⁴ The conventional understanding of this clause formed a robust nondelegation doctrine: Congress may not delegate its legislative power to any other branch,¹⁵ particularly in matters of criminal law.¹⁶ But the realities of statutory interpretation and adjudication prevented the Court from taking this declaration too literally.¹⁷ Attempts to apply the doctrine¹⁸ continually failed,¹⁹ and as a result, this version of the nondelegation doctrine has enjoyed but "one good year," when it served to check the expansive New Deal activities under President Franklin D. Roosevelt.²⁰ Since, the Court

13. For especially useful historical treatments of the nondelegation doctrine beyond the sketch most relevant to the lenity discussion presented here, see Lisa Schultz Bressman, Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State, 109 YALE L.J. 1399, 1402 (2000) (arguing that the "new delegation doctrine . . . asks how . . . the law is being made" rather than "who ought to make law"); Cass R. Sunstein, *Is the Clean Air Act Unconstitutional*, 98 MICH. L. REV. 303, 330-35 (1999) (outlining the "old nondelegation doctrine"). See generally DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 3 (1993) (arguing against broad Congressional delegation).

14. U.S. CONST. art. 1, § 1.

15. *Mistretta v. United States*, 488 U.S. 361, 371-72 (1989) ("[W]e long have insisted that the 'integrity and maintenance of the system of government ordained by the Constitution' mandate that Congress generally cannot delegate its legislative power to another Branch." (quoting *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892))).

16. See *Bass*, 404 U.S. at 349 (refusing "to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction"); *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812) (barring federal common law crimes in deference to "the legislative authority of the Union").

17. See, e.g., *Cargo of the Brig Aurora*, 11 U.S. (7 Cranch) 382, 387-88 (1813) (recognizing the nondelegation principle but upholding a disputed statute because it issued from Congress rather than the President and did not grant him unguided authority); see also Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 347 (arguing that despite the theory of nondelegation, in practice, there is an unspoken rule that Congress may delegate criminal lawmaking authority to the courts).

18. See *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) (outlining an "intelligible principle[s]" test to determine whether Congress had provided sufficient guidance and limits to "the person or body authorized" to carry out the terms of a statute to effect a permissible delegation of its legislative powers).

19. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (remarking on the problems of judicial enforcement of the conventional doctrine and its intelligible principles test); see also Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 324-28 (1987) (noting the "absence of judicially manageable and enforceable criteria to distinguish permissible from impermissible delegations").

20. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000); Sunstein, *supra* note 13, at 330. The Court invoked the doctrine for the first and

has declined to invoke the old nondelegation doctrine,²¹ even when it had plausible cause to do so.²² The doctrine's continued dormancy prompted notable scholars to pronounce the nondelegation doctrine dead.²³

Professor Cass Sunstein, however, has convincingly argued that the doctrine lives on, "relocated rather than abandoned."²⁴ It shifted, he argues, to a series of smaller nondelegation doctrines that appear in the form of canons of statutory interpretation.²⁵ Indeed, as the Supreme Court noted in *Mistretta v. United States*: "In recent years, our application of the nondelegation doctrine principally has been

last time in 1935 to invalidate two congressional statutes, most notably in the *Schechter Poultry* case. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935) ("We think that the code-making power conferred is an unconstitutional delegation of legislative power."); *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 430 (1935) (holding that the National Investment Recovery Act "goes beyond" the "limits of delegation which there is no constitutional authority to transcend"). For discussion of nondelegation cases before and after 1935, see *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting) (collecting post-New Deal nondelegation cases); *J.W. Hampton, Jr. & Co.*, 276 U.S. at 406–07 (collecting pre-New Deal nondelegation cases).

21. A possible exception arose a decade ago, when the old doctrine appeared in response to the appellate decision *Am. Trucking Ass'ns, Inc. v. EPA*, 175 F.3d 1027, 1034 (D.C. Cir. 1999) (striking down a provision of the Clean Air Act that was bounded by no intelligible principle for informing EPA standards to determine when public health concern with respect to ozone levels were reasonable), *rev'd*, *Am. Trucking Ass'ns*, 531 U.S. at 472. The Supreme Court overturned the D.C. Circuit decision, with a restatement of the older doctrine: "In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to the agency" whereas Article 1, Section 1 "permits no delegation of those powers." *Am. Trucking Ass'ns*, 531 U.S. at 472. But it affirmed the delegation in this case upon determining that the EPA standards sufficed as the "intelligible principles" to guide agency discretion. *Id.* at 474.

22. That is, the Court upheld congressional delegations even when the "intelligent principle" arguably was lacking. See, e.g., *Mistretta*, 488 U.S. at 413 (Scalia, J., dissenting) ("I can find no place in our constitutional system for an agency created by Congress to exercise no governmental power other than the making of laws."); *United States v. Sw. Cable Co.*, 392 U.S. 157, 178 (1968) (upholding the Communication Act's delegation of authority to the FCC to regulate cable television to the extent it was "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting"); *Lichter v. United States*, 334 U.S. 742, 785–86 (1948) (upholding Renegotiation Act's delegation to the War Department to recover "excessive profits" on war contracts even though "excessive profits" was not defined by Congress until a later amendment); *Yakus v. United States*, 321 U.S. 414, 426–27 (1944) (upholding the Emergency Price Control Act's grant of authority to Price Administrator to fix "fair and equitable" commodities prices).

23. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 132–33 (1980).

24. Sunstein, *supra* note 20, at 315–16.

25. *Id.* But see David Driesen, *Loose Canons: Statutory Construction and the New Nondelegation Doctrine*, 64 U. PITT. L. REV. 1, 23–24 (2002) ("Notwithstanding . . . evidence that the nondelegation doctrine has played little or no role in the Supreme Court's construction of statutes, Cass Sunstein argues that the nondelegation doctrine is "alive and well" in the realm of statutory construction. . . . [T]hese canons do not implement a nondelegation doctrine." (citations omitted)).

limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that otherwise might be thought to be unconstitutional.”²⁶ Accordingly, to grasp the nature of the new nondelegation doctrine and the scope of legislative supremacy, we must look not to the Constitution’s separation of powers clauses, but to *interpretive canons* or *legal maxims*.

The “new nondelegation doctrine” applied broadly, but stopped short when it came to criminal law. The oft-cited *Chevron* case required courts to defer to agency interpretations of statutes within their scope of authority,²⁷ but not so with agencies related to criminal law. Allowing the Department of Justice to guide adjudication would be the exemplar of the administrative fox guarding the henhouse— notwithstanding at least one proposal to the contrary.²⁸ If *Chevron* deference can be labeled the “quintessential prodelegation canon,”²⁹ then lenity can be dubbed the quintessential nondelegation canon. As a quasi-constitutional doctrine, it vindicates the idea of legislative supremacy much more than the full nondelegation doctrine ever did.

B. *Lenity as a Uniquely American Rule of Structure?*

It seems only natural that those committed to a structural view of our constitutional commitments would enthusiastically promote the rule of lenity within the family of nondelegation canons.³⁰ For

26. *Mistretta*, 488 U.S. at 373 n.7; see also *Int’l Union, UAW v. OSHA*, 938 F.2d 1310, 1316 (1991) (noting the Court’s “general practice of applying the nondelegation doctrine mainly in the form of ‘giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional’” (citing *Indus. Union Dept., AFL-CIO v. Am. Petrol. Inst.*, 448 U.S. 607, 646 (1980))).

27. *Chevron USA v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). *Chevron* is the single-most cited case in court opinions, and inspired an enormous body of academic commentary. See Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 823 (2006) (noting that *Chevron* is “the most cited case in modern public law”). For an exhaustive study, see William N. Eskridge, Jr. & Lauren Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1085 (2008) (surveying all 1014 Supreme Court cases between *Chevron* in 1983 and *Hamdan* in 2006).

28. See Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 490–91 (1996) (acknowledging but arguing against the practice of not extending *Chevron* deference to Department of Justice interpretations of federal criminal laws).

29. Sunstein, *supra* note 20, at 329 (emphasis added).

30. Sunstein notes lenity as just one of a family of such canons. See *id.* at 330–35 (listing the “nondelegation canons” that trump even the strong pull of *Chevron* deference to agency constructions of statutes that raise constitutional doubts, preempt state law, or infringe on the sovereignty of Native Americans). For a fuller exposition of lenity as a structural rule, see Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 886 (2004) (emphasizing the nondelegation, or

example, Justice Scalia, who maintains that constitutional “structure is everything,”³¹ is also the Supreme Court’s primary proponent of the rule of lenity.³² His support seems unlikely at first blush. Because lenity applications often shield defendants from harsh punishment, it gives the impression of being pro-defendant, anti-textualist, and contra-legislative will; it also seems to provide a direct safeguard for individual rights through constraining judges from entering convictions in cases of doubt. Indeed, the Court and other commentators have understood the rule to be doing just that.³³

Not so for Justice Scalia. For him, the rule makes sense precisely because it calls on judges to defer not to slippery notions of substantive rights, but to the express will of Congress. That is, Justice Scalia does not embrace lenity out of any “sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct.”³⁴ Rather, he understands

legislative supremacy, rationale for the rule of lenity); Note, *Justifying the Chevron Doctrine: Insights from the Rule of Lenity*, 123 HARV. L. REV. 2043, 2055–59 (2010) (detailing the legislative supremacy rationale).

31. Antonin Scalia, *Foreword: The Importance of Structure in Constitutional Interpretation*, 83 NOTRE DAME L. REV. 1417, 1417–18 (2008) (“In the days when I taught constitutional law . . . [there were] two constitutional courses. One was entitled Individual Rights and Liberties, and focused primarily upon guarantees of the Bill of Rights. The other (I forget the title of it) focused upon the structural provisions of the Constitution, principally the separation of powers and federalism. That was the course I taught—and I used to refer to it as *real* constitutional law. The distinctive function of a constitution, after all, is to constitute the political organs, the governing structure of a state. . . . Structure is everything.”).

32. Kahan, *supra* note 17, at 348, 390–96 (discussing Justice Scalia’s aggressive defense of lenity); Sarah Newland, Note, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 HARV. C.R.–C.L. L. REV. 197, 205 (1994) (“Justice Scalia is one of the strongest supporters of lenity . . .”).

33. See, e.g., *United States v. Bos. & Me. R.R.*, 380 U.S. 157, 160 (1965) (strictly construing a statute to protect property rights in light of lenity); *Callanan v. United States*, 364 U.S. 587, 596 (1961) (noting that several times, “the rule of lenity was utilized *in favorem libertatis*, to resolve the ambiguity” (citing *Ladner v. United States*, 358 U.S. 169 (1958); *Bell v. United States*, 349 U.S. 81 (1955); *United States v. Universal C. I. T. Credit Corp.*, 344 U.S. 218 (1952))); *Bonetti v. Rogers*, 356 U.S. 691, 699 (1958) (applying the rule of lenity in defense of the right to travel: “We cannot ‘assume that Congress meant to trench on [an alien’s] freedom beyond that which is required by the narrowest of several possible meanings of the words used.’” (citations omitted)); *Bos. & Me. R.R.*, 380 U.S. 157 (applying lenity to protect property rights); cf. William N. Eskridge, Jr., *All About Words: Early Understandings of ‘Judicial Power’ in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 992 (2001) (“In my view, Article III judges interpreting statutes are both agents carrying out directives laid down by the legislature and partners in the enterprise of law elaboration, for they (like the legislature) are ultimately agents of ‘We the People.’”).

34. *Holloway v. United States*, 526 U.S. 1, 21 (1999) (Scalia, J., dissenting) (“When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this is not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct. It may fairly be said to be a presupposition of

our constitutional structure to require courts to apply lenity in cases of doubt out of paramount concern with legislative supremacy in an area of law that happens to have due process implications as well. In his words, the separation of powers framework permits “legislatures and not courts [to] define criminal activity.”³⁵ Due process considerations for criminal law further dictate that, because only legislatures should define punishable conduct, they should state “in a language that the common world will understand, [] what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.”³⁶ Lenity for Justice Scalia, in principal measure, gives voice to the otherwise weakened nondelegation doctrine in the important area of criminal law. Any benefits that accrue to the defendant are collateral and derivative of the constitutional structure.³⁷

C. American Exceptionalism in Lenity

Joining Justice Scalia, leading scholars of legislation and constitutional law have argued that lenity is so tied to a uniquely American constitutional structure that the only way to understand it is through the lens of structural considerations that reveal the proper extent of judicial discretion. For example, Professor John Manning maintains that the structural assumptions underlying the U.S. Constitution uniquely and radically constrain judicial discretion.³⁸ Taking the “judicial power” in Article III as a starting point, he rejects the notion that American law encompasses the old English common law idea of the “equity of the statute”³⁹—the well-known

our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment.” (quoting *Bell v. United States*, 349 U.S. 81, 83 (1955)).

35. *United States v. Bass*, 404 U.S. 336, 348 (1971).

36. *Id.*; see also *Moskal v. United States*, 498 U.S. 103, 131 (1990) (Scalia, J., dissenting) (explaining lenity as “the venerable principle that ‘before a man can be punished as a criminal under the federal law his case must be plainly and unmistakably within the provisions of some statute.’” (quoting *United States v. Gradwell*, 243 U.S. 476, 485 (1917))); *Arnold v. United States*, 13 U.S. (9 Cranch) 104 (1815) (syllabus) (“To enforce any positive rule as a law, before the individual could be presumed to know it, would be alike inconsistent with public justice and civil right. . . . In relation to positive law, that principle implies the necessity of its being made known before it can impose any obligation. Positive law is a manifestation of the legislative will; and although there may be a legislative will, it does not become a law, where it is not manifested.”).

37. Antonin Scalia, *supra* note 31, at 1418 (noting that individual rights and liberties are derivative to structure, without which the system cannot “safeguard individual liberty”). Indeed, scholars have long argued that lenity enjoys “quasi-constitutional” status, in view of its link to the nondelegation doctrine concerned with the separation of powers articles. See Kahan, *supra* note 17, at 346.

38. John Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 56 (2001).

39. *Id.* at 57.

practice of English judges in the eighteenth century and before⁴⁰ to diverge from the text of the statute for equitable reasons.⁴¹

At common law, lenity was an equity principle used to wide effect in both substantive and evidentiary contexts.⁴² The rule emerged in seventeenth and eighteenth century England at a time when statutes imposed the death penalty for a wide range of offenses—from severe crimes, like murder, to minor misdemeanors, like petty theft.⁴³ The doctrine of parliamentary supremacy ostensibly barred judges from diverging from those statutes.⁴⁴ At the same time, judges and juries faced increased pressure to convict, even where the sentences seemed excessively harsh. This created a moral dilemma.⁴⁵ How could courts impose the harsh criminal sanctions in cases where they entertained doubt as to criminal culpability or deemed the sanctions wildly disproportionate to the crime?⁴⁶

40. *Id.* at 27–56 (tracing the origins of equity to Aristotelian notions that “equity should mitigate the defects of generally worded laws,” and noting its application by English courts possibly as early as the thirteenth and fourteenth centuries).

41. *Id.* at 22 (defining “equity of the statute” as a “doctrine authoriz[ing] courts to extend a clear statute to reach omitted cases that fell within its ration or purpose, and conversely, to imply exceptions to such a statute when the text would inflict harsh results that did not serve the statutory purpose”).

42. The history of lenity is elaborated at length elsewhere. For lenity jurisprudence in the English common law, see JAMES Q. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL* (2008) (discussing the emergence of the reasonable doubt doctrine as a version of lenity in England and Continental Europe) and JOHN H. LANGBEIN, *THE ORIGINS OF THE ADVERSARY CRIMINAL TRIAL* 334–36 (A. W. Brian Simpson ed., 2003) (detailing the methods by which court officials in England avoided prosecuting criminals as a precursor to the formalized rule of lenity).

43. See LEON RADZINOWICZ, *1 A HISTORY OF ENGLISH LAW AND ITS ADMINISTRATION FROM 1750*, at 3–4 (1948) (detailing the growing number of crimes punishable by death in eighteenth century England); ROBERT B. SHOEMAKER, *PROSECUTION AND PUNISHMENT: PETTY CRIME AND THE LAW IN LONDON AND RURAL MIDDLESEX, C. 1660–1725* (Anthony Fletcher et al. eds., 2008).

44. See, e.g., ALBERT DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 60 (1885) (outlining the interaction of English courts and the legislative sovereignty of Parliament).

45. A “moral discomfort” arose time and again, particularly after the Church abolished the ordeals in 1215, making judges and eventually juries responsible for making determinations of guilt and innocence for which they believed themselves to be accountable before God. See WHITMAN, *supra* note 42, at 97–124, 129–57, 192–99 (explaining a long history of moral dilemmas facing both judges and juries in early American and Continental European criminal law).

46. See LANGBEIN, *supra* note 42, at 334–36 (noting the growing aversion to capital punishment in late eighteenth and early nineteenth century England because of the disproportionality between criminal violations and capital punishment and because of the “truth-defeating” techniques of adversary procedure). On the resulting abolition of the death penalty, see generally BRIAN P. BLOCK & JOHN HOSTETTLER, *HANGING IN THE BALANCE: A HISTORY OF THE ABOLITION OF CAPITAL PUNISHMENT IN BRITAIN* (1997) and JAMES WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* (2003).

Accordingly, judges devised strategies to avoid findings of guilt in all but the most egregious instances of criminal offenses.⁴⁷ For example, they expanded the scope of the old “benefit of the clergy” doctrine, which originally exempted members of the Church from the criminal jurisdiction of secular courts and placed them in the more lenient ecclesiastical courts. The benefit became a general rule that allowed first-time offenders to receive more lenient sentences.⁴⁸ And They consistently “down-charged” crimes or “downgraded” the value of stolen goods to arrive at a milder sentence than the statute otherwise required.⁴⁹ And eventually, they devised the formal notion of the “beyond a reasonable doubt” standard of proof, barring criminal convictions where the evidence caused significant uncertainty about culpability.⁵⁰ Taken together, the lasting judicial iteration of these schemes became the common law rule of lenity: equitable principles of narrowing construction and reasonable doubt that were regular judicial practice by the early eighteenth century.⁵¹

47. JEROME HALL, *THEFT, LAW, AND SOCIETY* 92 (1935) (noting that judges used to “invent technicalities in order to avoid infliction of the capital penalty”).

48. See LEONA C. GABEL, *BENEFIT OF CLERGY IN ENGLAND IN THE LATER MIDDLE AGES* (1929) (noting that the benefit was widely available at the end of the thirteenth century to religious “clerks” and extended in the fourteenth century to cover anyone who could read); PETER BENSON MAXWELL, *ON THE INTERPRETATION OF STATUTES* 243 (1875) (discussing the “benefit of the clergy”); see also J. H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 513–15 (4th ed. 2002); J. M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND, 1660–1800*, at 141–45 (1986) (giving examples of the benefit of the clergy); John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 59 U. CHI. L. REV. 1, 36–41 (1983) (same). The broad extension of the benefit in the seventeenth century and afterward led some commentators to conclude that rules of strict construction applied indiscriminately. E.g., Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 751 (1935) (noting that the courts’ use of “extreme technicality” to find ambiguity that would trigger strict construction was “unrestrained”); Kahan, *supra* note 17, at 358 (calling the resulting construction from applying the benefit of clergy not just “narrow[],” but “in many cases, fantastic[]”).

49. Langbein, *supra* note 48, at 21–22 (citing 4 WILLIAM BLACKSTONE, *COMMENTARIES* 239) (detailing the methods by which court officials avoided prosecuting criminals, including down-charging or down-valuing goods in theft cases); RADZINOWICZ, *supra* note 43, at 83–106 (discussing the methods courts used to impose a lesser sentence).

50. WHITMAN, *supra* note 42, at 192–99.

51. There is debate about when lenity became prevalent, but agreement that it was in full force by the eighteenth century. See Hall, *supra* note 48, at 750 nn.12–13 (tracing the consistent use of the rule of lenity back to mid-seventeenth-century England); RADZINOWICZ, *supra* note 43, at 83 (describing both an increase in legislative preference for capital punishment and decrease in public preference for harsh punishment during the eighteenth century); LANGBEIN, *supra* note 42, at 334 (noting that the rule predated eighteenth-century England but did not become prevalent until then); WHITMAN, *supra* note 42, at 186–200. But see Philip M. Spector, *The Sentencing Rule of Lenity*, 33 U. TOL. L. REV. 511, 521 (2002) (“[W]hat we understand to be the rule of lenity—the rule that substantive criminal statutes should be interpreted narrowly—itself has no early British counterpart. . . . [T]he substantive rule of lenity is an American creation, forged in the furnace of American constitutionalism.”).

According to Manning, equitable constructions like this expansive sort of lenity never really got off the ground on American shores because of a new constitutional structure that made legislative supremacy absolute.⁵² The Framers meant for the Constitution's separation of powers scheme to constrain the judicial discretion rampant in eighteenth century England.⁵³ Moreover, he argues, early American understandings of the judicial power probably meant that equitable readings mirroring English lenity were unpopular in favor of more "faithful" enforcement of the statutory texts.⁵⁴

Spector concurs in the view that American law fundamentally transformed the English rule of lenity.⁵⁵ Though he doubts that English lenity was as broad as Manning and others suggest, he too concludes that *American* lenity is a wholly new version of the rule tied to the American constitutional structure.⁵⁶ For him, the rule that appeared in English courts had nothing to do with narrow or equitable construction of statutes themselves. There, it was only an evidentiary rule equivalent to "judicial nullification of exceedingly harsh punishments."⁵⁷ Thus it was an equitable rule of mercy that applied to sentencing, having nothing to do with American structure and rules for interpreting texts.

Once the rule reached American shores, in Spector's narrative, it was folded into a new constitutional structure that constrained the equitable powers of the courts.⁵⁸ Echoing Manning, Spector maintains that the rule came to serve "two fundamental (but largely *procedural* or *structural*) facets of American constitutionalism, rather than the substantive ends of mercy and substantive justice."⁵⁹ The first constitutional facet is the separation of powers—which supports the nondelegation rationale for lenity.⁶⁰ The second is due process of law, the collateral benefit of structure at which Justice Scalia

52. Manning, *supra* note 38, at 57–58.

53. See *id.* at 37–46 (noting that England lacked a strong system of separated powers); see also *id.* at 57–102 (arguing that the U.S. Constitution instituted a robust model of separated powers designed to limit judicial discretion rather than continue to allow the "flexibility implicit in a more discretionary [English] approach to statutory interpretation").

54. See *id.* at 57 ("[T]he original understanding [of the Judicial Power] indicates that, in contrast with relevant English practice, the U.S. Constitution self-consciously separated the judicial from the legislative power and, in doing so, sought to differentiate sharply the functions performed by these two distinct branches.").

55. Spector, *supra* note 51, at 522.

56. *Id.*

57. *Id.* at 523.

58. *Id.* at 522–24.

59. *Id.* at 523 (emphasis added).

60. *Id.* at 522.

gestured as well.⁶¹ No longer could mercy play a role in determinations of guilt, however harsh the associated punishment might be. No longer could courts diverge from clear statutory text through judicial nullifying strategies, however disproportionate the legislated punishment. Instead courts were to faithfully apply the text of a clear statute. Only where the text was ambiguous could the courts narrowly construe its substantive provisions in recognition of their scaled back scope of discretion and in keeping with the ideals of legislative supremacy and nondelegation.⁶² All of this, Spector concludes, resulted in a uniquely American form of lenity. “[T]he rule of the lenity, as we understand it today,” he says, “appears to have been a *distinctively American* creation, driven by *distinctively American* concerns . . . [and] forged in the furnace of American constitutionalism.”⁶³

The accounts differ in the details, but Manning and Spector—along with Justice Scalia—agree that the nondelegation doctrine drives a uniquely American rule of lenity. They aim to explicate the Judicial Power through distinguishing between the old English common law and the American law approaches to lenity and equity. For them, whereas the old English system authorized broad discretion (and hence lenity on the basis of equitable considerations), the American structure forbids it, promoting strong legislative supremacy instead. Manning’s and Spector’s arguments have another effect as well: they lead to the conclusion that American structure is exceptional and unique—so unique that it cannot compare to the English common law, and *a fortiori*, to other legal systems even farther removed. No doubt, classical Islamic law would be the last system they would find even remotely comparable to the American one concerning the function of lenity and the role of the courts. Yet, might the attempt to distinguish the American rule of lenity conceal key aspects of such rules in other contexts? Might the resulting inward focus present an uninformed picture of whether the American

61. *Id.* at 535–56 (listing separation of powers and due process as the two primary constitutional rationales for lenity and adducing several “nonconstitutional” arguments for lenity as well).

62. Spector concludes based on this analysis that it is incoherent to apply lenity to sentencing statutes. Doing so ignores the fact that judicial discretion over sentencing is legislatively conferred. Thus, a “sentencing rule of lenity” cannot serve the structural and procedural purposes—nondelegation and due process—underlying the textual version of the lenity rule. *Id.* at 512. *But see, e.g.,* *Albernaz v. United States*, 450 U.S. 333, 342 (1981) (“[W]e [have] recognized that the rule of lenity is a principle of statutory construction which applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose.”).

63. Spector, *supra* note 51, at 520–21 (emphasis added).

system is in fact unique, potentially obscuring important features of our system and its comparative value for evaluating others? For comparative insights, it is worth investigating how Islamic law dealt with questions of doubt in criminal law, and the meaning it gave to legislative supremacy and lenity.

III. LEGISLATIVE SUPREMACY AND ISLAMIC CRIMINAL LAW

Like the nondelegation vision of American lenity, Islamic law has always promoted a strong form of legislative supremacy. The significant difference is that the medieval Islamic law version was stronger because it was divine and absolute. Muslims conceived of God as the *sole* Legislator; obedience to Him through implementing His law was sacred duty.⁶⁴ Muslim theologians and jurists had a relatively straightforward answer to the positivist question of why people should follow the law: religious texts—namely the Qur’ān and prophetic edicts—required it. Accordingly, common slogans of Muslim political movements from the seventh century through the twenty-first urge adherence to divine sovereignty, and are in fact the same phrases found approvingly throughout early and medieval Islamic jurisprudential literature: “Every rule of law comes from God” and “God is the [sole] Lawgiver.”⁶⁵ No one—not even the Prophet Muḥammad, much less judges—had discretion to diverge even slightly from the law of God. The Prophet was simply a bearer of God’s message expressed through the Qur’ānic revelation.⁶⁶ The articulation and implementation of the Prophet’s life example (as well as that of a series of Imāms who assumed religious leadership after the Prophet in Shī’ī law and theology) provide a clarifying source of law—which jurists refer to as the Sunna.⁶⁷ The Qur’ān and Sunna together were taken as normative and thus form the foundational, or “constitutional,” sources of Islamic law.

64. The only required step to falling under its *aegis* was recognizing one deity as God and Muḥammad as His last Prophet, thus triggering recognition of their authority over law (that is, “the rule of recognition” for Islamic contexts). Cf. H. L. A. HART, *THE CONCEPT OF LAW* 94–95 (2d ed. 1994) (“[The] ‘rule of recognition’ . . . specif[ies] some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts. The existence of such a rule of recognition may take any one of a wide variety of forms, simple or complex . . . [Reducing all rules to writing in one place] is not itself the crucial step, though it is a very important one: what is crucial is the acknowledgement of reference to the writing or inscription as *authoritative*, i.e., as the *proper* way of disposing of doubts as to the existence of the rule.”).

65. BERNARD WEISS, *SPIRIT OF ISLAMIC LAW* 36 (1998).

66. For an overview, see Roy P. Mottahedeh, *Introduction* to MUHAMMAD BAQIR AŞ-ŞADR, *LESSONS IN ISLAMIC JURISPRUDENCE* 1–27 (Roy P. Mottahedeh trans., 2003).

67. *Id.*

The medieval Islamic political structure did not conceive of, much less mandate, three separate branches of government in the way America and most other nations do today.⁶⁸ In fact, Islamic political theorist typically maintained that there was no temporal authority over divine law at all.⁶⁹ In the most basic terms, there were only two government branches: (1) an executive—the caliph or *sulṭān* who took charge of community leadership and was responsible for executing God’s law after the Prophet Muḥammad’s death⁷⁰—and (2) “courts”—the body of judges who helped the executive implement that law.⁷¹ Alongside the government was a third group—legal scholars, or “jurists”—who developed expertise in matters of law and legal interpretation and thus came to be recognized as the appropriate agents to say what the law is.⁷² All were meant to be merely faithful agents of a divine Legislator. The Arabic term for caliph, *khalīfa*, quite literally means “agent” or “deputy.”⁷³ The jurists aimed to carry on divine and prophetic teachings to aid the caliph in implementing God’s law.

In the Islamic criminal law arena, as we will see, issues of constitutional structure concerning the authority to interpret and enforce the law were most pronounced. According to Muslims, God drafted a series of fixed, mandatory criminal sanctions called *ḥudūd*, in the foundational sources of law (the Qur’ān and the Sunna).⁷⁴ So explicit were these laws that Muslim leaders easily understood adherence to them as the prime example of upholding the doctrine of divine legislative supremacy. That is, even if the argument could be made elsewhere that God had delegated the task of elaborating the law, in criminal law, such an argument was extremely difficult given the explicit nature of the laws. Instead, early Muslims concluded that no one—neither political nor juristic authorities—could make or alter *ḥudūd* laws.⁷⁵

Yet, jurists seemed to do just that through the guise of legal canons. Notably, they developed the *ḥudūd* maxim, an Islamic law parallel to the rule of lenity, cautioning judges to “avoid *ḥudūd*

68. See generally A. K. S. LAMBTON, STATE AND GOVERNMENT IN MEDIEVAL ISLAM: AN INTRODUCTION TO THE STUDY OF ISLAMIC POLITICAL THEORY (1981) (discussing the structure of Islamic government and its relation to Islam).

69. *Id.*

70. *Id.*

71. *Id.*

72. See, e.g., PATRICIA CRONE & MARTIN HINDS, GOD’S CALIPH: RELIGIOUS AUTHORITY IN THE FIRST CENTURIES OF ISLAM 48–49 (1986).

73. *Id.* at 4–5.

74. RUDOLPH PETERS, CRIME AND PUNISHMENT IN ISLAMIC LAW: THEORY AND PRACTICE FROM THE SIXTEENTH TO THE TWENTY-FIRST CENTURY 6–8, 53–65 (2005).

75. ABŪ AL-ḤASAN AL-MĀWARDĪ, 1 KITĀB AL-ḤUDŪD MIN AL-ḤĀWĪ AL-KABĪR 100–01 (Ibrāhīm b. ‘Alī Ṣanduqī ed., 1995) (citing the opinion of early Iraqi judge and legal scholar Ibn Qutayba for the proposition that “it is impermissible for anyone to exceed or decrease” the scope of the law or the associated punishment).

sanctions in cases of doubt or ambiguity.”⁷⁶ How did these jurists justify this maxim within Islam’s strict doctrine of legislative supremacy and constrained judicial discretion, especially in matters of criminal law?

A. Structures of Islamic Law and Governance

Typical premodern Islamic legal and governmental systems differed significantly from modern ones. Most modern Muslim-majority states—at least in form—tend to follow an American-style tri-partite structure of three branches: executive, legislative, and judicial.⁷⁷ But medieval polities followed a different division of labor, owing to theological, historical, and other factors accompanying Islam’s advent and subsequent religio-political history.

When Islam first emerged in seventh century Arabia, Muḥammad became the religious and political head of a fledgling but expanding Muslim community. He claimed to be a prophet, bringing revelation from God, and Muslims looked to his life example for guidance on issues of law and morality. During his lifetime, the community believed that the sole legislator was God, and the Prophet merely an exponent of God’s legislation.⁷⁸ In actual judgments, no one had discretion to apply anything outside of that law, not even the Prophet.⁷⁹ This very thick version of legislative supremacy shows up most starkly in criminal law. To the Prophet is attributed a famous quote in a case where he told members of the elite who tried to intervene on behalf of a member of their clan, that even his hands were tied from pardoning a woman who had a proven record of theft: “Would you intervene on a matter involving God’s criminal laws (*hudūd Allāh*)?! . . . I swear by God that even if Fāṭima, daughter of Muḥammad [my own daughter], had stolen, I would cut off her

76. For discussion of the origins and development of the rule, see Intisar A. Rabb, *Islamic Legal Maxims as Substantive Canons of Construction: Hudūd-Avoidance in Cases of Doubt*, 17 J. ISLAMIC L. & SOC’Y 63, 114–16 (2010).

77. Muslims form the majority of populations from Southeast Asia to Sub-Saharan Africa, and the Organization of Islamic Conference comprises fifty-seven states spread over four continents. For an insightful review of constitutional structures and legal systems in the modern Middle East, see generally NATHAN J. BROWN, *CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD: ARAB BASIC LAWS & THE PROSPECTS FOR ACCOUNTABLE GOVERNMENT* (2001). For the role of religion in areas outside of the Arab Middle East, see generally ZUR ROLLE VON RELIGION IN DEMOKRATISIERUNGSPROZESSEN (Mirjam Künkler & Julia Leininger eds., 2009) (describing a comparative study of the role of religious institutions in democratic transition and consolidation processes).

78. For overviews of the legal structure during the Prophet’s lifetime and immediately after, see ŞUBHĪ MAḤMAŞĀNĪ, *THE PHILOSOPHY OF JURISPRUDENCE IN ISLAM* 15–16 (Farhat J. Ziadeh trans., E.J. Brill 1961) (1946) and Mottahedeh, *supra* note 66, at 4–14.

79. See sources cited *supra* note 78.

hand!"⁸⁰ The story offers a rebuke to those who tried to encourage leniency for high-status offenders. Quite likely, it also represents later attempts to curb such practices, which had become regular occurrences in the Umayyad and 'Abbāsīd dynasties of the eighth and ninth centuries.⁸¹ More generally, the anecdote is instructive for the view that the *hudūd* laws bound even the Prophet.

The Prophet's death in 632 CE caused a crisis over succession that changed the political organization of the Muslim community.⁸² The community emerged with a series of four caliphs who asserted absolute political authority and consulted with learned companions and family members of the Prophet about issues of law and religion.⁸³ The caliphs' judicial appointments were drawn from the same ranks of these learned circles.⁸⁴ As senior members of these circles, the caliphs instructed governors and judges with general policies on judging,⁸⁵ resolved difficult legal questions,⁸⁶ and often issued direct

80. According to the sources, the woman—who was from a prominent clan in the Prophet's own tribe of the Quraysh—used to borrow money then deny that she had borrowed it, amounting to theft. For records of these reports in mid-ninth century Sunnī canonical *ḥadīth* collections, see ABŪ DĀWŪD AL-SIJISTĀNĪ, 4 SUNAN 133, nos. 4373–74 (Muḥammad 'Abd al-'Azīz al-Khālīdī ed., 1996); AḤMAD B. SHU'AYB AL-NASĀ'Ī, 4 AL-SUNAN AL-KUBRĀ 330 (Hasan 'Abd al-Mun'im al-Shalābī ed., 2001); ABŪ BAKR AL-BAYHAQĪ, 8 SUNAN 267, no. 17004 (Muḥammad 'Abd al-Qādir 'Atā' ed., 1994).

81. Cf. Maribel Fierro, *When Lawful Violence Meets Doubt*, 5 HAWWA 208, 233 (listing cases where the *hudūd* maxim was used to benefit high-status offenders).

82. The Prophet's death has been labeled the first "crisis of Muslim history." MAHMOUD M. AYOUB, *THE CRISIS OF MUSLIM HISTORY: RELIGION AND POLITICS IN EARLY ISLAM 7* (2003). Former companions of the Prophet succeeded in squashing breakaway groups and managed to maintain a hold on power during a period of rapid expansion. They made executive decisions about military campaigns, tax collection, and gubernatorial and other administrative appointments. See HUGH KENNEDY, *THE PROPHET AND THE AGE OF THE CALIPHATES: THE ISLAMIC NEAR EAST FROM THE SIXTH TO THE ELEVENTH CENTURY 50–81* (2d ed. 1986).

83. These caliphs laid some claim to religio-legal authority too, though in a more diffused fashioned, shared with scholars who contributed to the elaboration of ritual, family, commercial and public law. See CRONE & HINDS, *supra* note 72, at 2–3 (arguing that caliphs after Abū Bakr saw themselves not just as political authorities but religious authorities as well).

84. For example, the Prophet appointed his cousin, 'Alī (who went on to become the fourth caliph and first Shī'ī Imām) and young companion Mu'ādh b. Jabal to judgeships in Yemen during his lifetime. MUHAMMAD B. KHALAF WAKĪ', *AKHBĀR AL-QUDĀT* 62–72 (Sa'īd Muḥammad al-Laḥḥām, 1950). The first judges in other centers at the time, including Mecca, Kufa, Basra, Damascus, and Egypt, were also learned companions and family members who recounted prophetic practices in their own adjudications. See, e.g., BAYHAQĪ, *supra* note 80, no. 17390 (describing companion and Kufan judge Ibn Mas'ūd's adjudication of a criminal accusation by reference to prophetic practice); NASĀ'Ī, *supra* note 80, no. 4887 (Ibn 'Umar reporting the Prophet's application of a *ḥadd* sentence); AL-ḤĀKIM AL-NAYSABŪRĪ, 4 AL-MUSTADRAK 'ALĀ 'L-SAḤĪḤAYN 134 (1997).

85. See, e.g., ABŪ AL-'ABBĀS AL-QALQASHANDĪ, 10 ṢUBḤ AL-A'SHĀ 21, 79, 359 (1981) (containing letters from the caliphs to regional governors, especially the letter from 'Umar to Abū Mūsā al-Ash'arī); *Letter no. 53*, in AL-SHARĪF AL-RADĪ, NAḤJ AL-BALĀGHA (Ṣubḥī al-Sāliḥ ed., 1967) (containing a letter sent from 'Alī to his Malik al-

legal rulings themselves.⁸⁷ Yet, they too saw themselves as beholden to the supremacy of the divine law. One judicial appointment story has it that a scholar challenged the second caliph 'Umar b. al-Khaṭṭāb for the destruction of a borrowed item, and the caliph was so impressed with the arbiter's reasoning—even though the decision was against him—that he appointed the arbiter a judge.⁸⁸

Within decades of the Prophet's death, the advent of Umayyad rule—the first of a series of dynasties—shifted the political organization once again.⁸⁹ Government continued to have its two-pronged structure of executive and judicial branches. But deficiencies of religious legitimacy and competence now forced the government actors to cede most interpretive authority over to the body of non-state jurists.⁹⁰ The historical sources portray the caliphate during this period as having gone from being an office of moral leadership concerned with establishing a just social order to one of tribal loyalties based on might-makes-right.⁹¹ The state-appointed judges consulted the expert “jurists”—from the learned circles of scholars⁹²—who continued to develop the law outside of state involvement and control.⁹³ Further, the jurists formed a part of a “pious opposition” to

Ashtar upon sending him to Egypt to take over as governor, which explicates judicial policy).

86. See, e.g., WAKĪ, *supra* note 84, at 360 (noting that the Iraqi judge Shurayḥ b. al-Hārith wrote to 'Umar for help in resolving issues of evidence and liability in a case of murder).

87. Most famous was the second caliph, 'Umar b. al-Khaṭṭāb, who ruled for ten years (634–644), and instituted lasting changes to the law itself. See MAḤMAṢĀNĪ, *supra* note 78, at 110–14 (listing his precedents concerning alms-tax, divorce, slave law, theft, sexual crimes, and discretionary punishments). There is indication that, while his religio-legal authority was not absolute, judges who questioned it did so at their own risk. WAKĪ, *supra* note 84, at 173–75 (noting that the Basran judge Iyās b. Subayḥ was compared to the false prophet Musaylima when he contested the second caliph's opinions on ritual purity).

88. WAKĪ, *supra* note 84, at 357 (appointment story of Shurayḥ, see *supra* note 87).

89. For a survey of Muslim dynasties, including a list of Umayyad rulers, see CLIFFORD EDMUND BOSWORTH, *THE NEW ISLAMIC DYNASTIES* (2d ed. 2004).

90. For the early development of this shift, see generally M. QASIM ZAMAN, *RELIGION AND POLITICS UNDER THE EARLY 'ABBĀSIDS: THE EMERGENCE OF THE PROTO-SUNNI ELITE* (1997).

91. AYUB, *supra* note 82, at 54–57 (arguing that this transformation to tribal loyalty began with 'Uthmān); cf. LOUISE MARLOWE, *HIERARCHY AND EGALITARIANISM IN ISLAMIC THOUGHT* 14–16, 28 (2002) (detailing a social egalitarian bent during the early Islamic period that became explicitly hierarchal during 'Uthmān's time and that Mu'āwiya's assumption of leadership based on bloodlines ended “the opportunity for social equalising” on the basis of piety criteria).

92. WAEL B. HALLAQ, *THE ORIGINS AND EVOLUTION OF ISLAMIC LAW* 38–39 (2005) (citing an instance where an Egyptian judge was appointed despite his lack of knowledge of inheritance laws).

93. For accounts of the early schools, beginning in the Umayyad reign and lasting until the formalization of legal doctrine under the early 'Abbāsids, see generally NURIT TSAFRIR, *THE HISTORY OF AN ISLAMIC SCHOOL OF LAW: THE EARLY SPREAD OF*

the government, reacting to what history depicts as the widespread and well-known Umayyad excesses.⁹⁴ In that capacity, the jurists insisted on *divine* legislative supremacy over political and religio-legal spheres alike.⁹⁵

The early period of the next regime, the 'Abbāsīd dynasty, saw the professionalization of the juristic classes as their teaching circles and their informal jurisprudential approaches developed into formal schools of law.⁹⁶ All of the jurists who became the eponyms of the enduring schools of Islamic law lived during this time: the heads of the main Sunnī law schools, Abū Ḥanīfa (d. 767) of the Ḥanafī school, Mālik (d. 795) of the Mālikī school, Shāfi'ī (d. 819) of the Shāfi'ī school, and Ibn Ḥanbal (d. 855) of the Ḥanbalī school, as well as that of the main Shī'ī school, Ja'far al-Šādiq (d. 765).⁹⁷ This time was also one of a rising textual tradition of law. During the ninth and tenth centuries, scholars compiled the famous collections of *ḥadīth* reports as sources for the Sunna and began to author the first full treatises on law (*fiqh*) and jurisprudence (*uṣūl al-fiqh*) in attempts to systematize the law.⁹⁸ Likewise, the group that was to form the Shī'ī community looked to jurists from their own ranks for religious guidance, knowledge of which came from devotion to the teachings of the Prophet and his family through continued study and transmission.⁹⁹ The fifth and sixth Imams in a line of twelve (Muḥammad Bāqir al-Šadr and Ja'far al-Šādiq) were in fact so

HANAFISM (2004) and HARALD MOTZKI, *THE ORIGINS OF ISLAMIC JURISPRUDENCE: MECCAN FIQH BEFORE THE CLASSICAL SCHOOLS* (Marion H. Katz trans., Brill 2002) (1991).

94. See JONATHAN P. BERKEY, *THE FORMATION OF ISLAM: RELIGION AND SOCIETY IN THE NEAR EAST, 600–1800*, at 84–85 (2003) (noting that while not all of the opposition was religious—some of it championing Arab ascendancy—most of it was, as diverse pockets of scholars and other members of the elite became increasingly distressed at reported Umayyad divergence from Qur'ānic and prophetic principles of justice).

95. *Id.*

96. See MAḤMAŠĀNĪ, *supra* note 78, at 17–19.

97. There were dozens, if not hundreds, more. See GEORGE MAKDISI, *THE RISE OF COLLEGES: INSTITUTIONS OF LEARNING IN ISLAM AND THE WEST* 2–4 (1981) (estimating up to five hundred such proto-Sunnī schools, most of which died out by the end of the ninth century).

98. MAḤMAŠĀNĪ, *supra* note 78, at 17–19 (calling this period the Golden Age, which accompanied the major translation movement from Greek into Arabic, the flowering of literature, and 'Abbāsīd patronage of the arts and sciences); see HOSSEIN MODARRESSI, *AN INTRODUCTION TO SHĪ'Ī LAW: A BIBLIOGRAPHICAL STUDY* 4–5 (1984) (listing the four canonical Shī'ī compilations of *ḥadīth*—reports of the Prophet and Imāms' words and practices). For discussions of the development of the *ḥadīth* compilations in Sunnī, see generally JONATHAN BROWN, *THE CANONIZATION OF BUKHĀRĪ AND MUSLIM: THE FORMATION AND FUNCTION OF THE SUNNĪ ḤADĪTH TRADITION* (2007) (listing the six canonical Sunnī compilations of *ḥadīth*—reports of the Prophet's words and practices).

99. HOSSEIN MODARRESSI, *CRISIS AND CONSOLIDATION IN THE FORMATIVE PERIOD OF SHĪ'ITE ISLĀM* 29 (1993).

universally well-regarded that eponyms of some Sunnī schools sought knowledge of the law from them as well.¹⁰⁰

In this period, it became clear that caliphal power over the law was to be limited to issues of the public sphere, while the jurists maintained authority over the religio-legal spheres. Where there was overlap—as there was in criminal law—the two groups worked together under the notion that they were to adhere to the will of God and follow the example of the Prophet in deference to the entrenched notion of divine legislative supremacy.¹⁰¹

B. Islamic Theories of Governance and Criminal Law

By the second half of the ‘Abbāsīd rule, caliphs and scholars reached a compromise around the contours of the preceding generations’ understandings of political and juristic authority over criminal law within the confines of divine legislative supremacy. In the tenth and eleventh centuries, jurists from both Sunnī and Shī‘ī communities produced definitive works of legal and political theory.¹⁰²

These works of political theory more precisely laid out the relationship between politics and juridical scholarship concerning the proper divisions of labor over matters of law. The eleventh century jurist Abū al-Ḥasan al-Māwardī (d. 1058) is credited as the first to propound a developed theory of “Islamic governance” in his book *al-Aḥkām al-sulṭāniyya* [*Rules of Governance*].¹⁰³ In it, he drew on earlier writings on the issues to draw conclusions from the centuries-long contests over religious and political authority.¹⁰⁴ From the Prophet’s death until his time, he observed that the community had been forced to make difficult decisions about law and governance.¹⁰⁵ The constitutional sources did not speak directly to new issues that constantly cropped up, and this forced community leaders to exercise a considerable amount of interpretive agency.¹⁰⁶ His was an attempt to account for the insertion of human interpretation into the legal

100. For instance, Abū Ḥanīfa and others reportedly studied under him. See Mottahedeh, *supra* note 66, at 5–8.

101. See generally ZAMAN, *supra* note 90 (discussing the development of non-state jurists as interpretive authorities).

102. For a history of the legal theoretical works in the Sunnī context, see WAEL B. HALLAQ, *ISLAMIC LEGAL THEORIES: AN INTRODUCTION TO SUNNĪ UṢŪL AL-FIQH* 33 (1997) and for the Shī‘ī context, MODARRESSI, *supra* note 99, at 7.

103. ABŪ AL-ḤASAN AL-MĀWARDĪ, *AL-AḤKĀM AL-SULTĀNIYYA WA’L-WILĀYĀT AL-DINIYYA* 250 (Muḥammad Fahmī al-Sirjānī ed., 1978).

104. *Id.*

105. *Id.*

106. See ZAMAN, *supra* note 90 (examining various loci of political and legal authority).

process, despite the doctrine of divine legislative supremacy with its accompanying version of an Islamic nondelegation doctrine.

In what had come to be a point of consensus by his time, only jurists who had received the requisite training were qualified to interpret Islamic law.¹⁰⁷ However, the ruler enjoyed considerable discretion over issues of public law by virtue of his duties to enforce the law, ensure the continued existence of the community, and preserve the sanctity of the public sphere.¹⁰⁸ Māwardī discussed these duties in terms of a ruler's overarching obligation to vindicate "God's claims" (*huqūq Allāh*) over the community as supreme Legislator. This is a point to which we will return. For now, it is sufficient to note that enforcement of *hudūd* laws was one of the few public duties required of the executive, and it was the main area of overlap in spheres of authority claimed by the jurists who articulated the law, and the rulers who enforced it.¹⁰⁹

In the final analysis, Māwardī articulated concisely what caliphs and scholars had long come to recognize: in matters of law and politics, each had an area of primary jurisdiction, and they were to work together in areas of overlap.¹¹⁰ The caliphs did not—and, no doubt, could not—assume sweeping religious authority over the law.¹¹¹

This developed model of Islamic political theory comprised three main institutions split along secular and religious lines. Two were governmental: the executive had political and decision-making authority over enforcing criminal laws, while the judiciary, as a deputy to the executive, applied these laws.¹¹² Both were to rely on a third institution, the non-governmental body of jurists, who had the institutional competence as well as the epistemic and moral authority to define the law, drawing from its foundational sources.¹¹³ In this way, Māwardī argued, the Muslim polity would remain true to its fundamental precepts that required using instruments of law and governance to implement the will of the supreme Lawgiver.¹¹⁴ Between the government branches and the jurists, a separation of

107. See Intisar A. Rabb, *Islamic Legal Minimalism*, in *STUDIES IN ISLAMIC LAW AND TRADITION* *1, *13–16 (Michael Cook et al. eds., forthcoming 2012) (noting that mainstream Sunnī communities required trained jurists to interpret Islam's foundational legal texts); cf. MODARRESSI, *supra* note 99, at 27–29 (noting that the early mainstream Imāmī Shī'ī community believed the authority of the Imāms to have been founded on them being learned scholars).

108. MĀWARDĪ, *supra* note 103, at 250.

109. See *id.* at 90–94 (including enforcement of *hudūd* laws in a short list of ten public duties that the executive authority of the state must fulfill).

110. *Id.*

111. See ZAMAN, *supra* note 90.

112. MĀWARDĪ, *supra* note 103, at 250.

113. See ZAMAN, *supra* note 90.

114. MĀWARDĪ, *supra* note 103, at 250.

powers of sorts obtained, with the jurists providing a check against the government and ensuring that it remained within the confines of the Law—at least symbolically if not always in fact.¹¹⁵

C. *Ḥudūd Crimes and Punishments*

Against this backdrop, *ḥudūd* laws took on many changes in definition as jurists confronted actual criminal cases and tried to limit the punishments authorized by the state through defining the punishments outlined in the Islamic legal texts. The term “*ḥudūd*” refers to both the major crimes and their associated punishments in Islamic criminal law.¹¹⁶ While in theory *ḥudūd* laws came from God and humans were barred from making or altering these laws, the matter was less clear-cut in practice. Jurists found it difficult to determine the legitimate application or scope of interpretation for *ḥudūd* because of the often indeterminate nature of Islamic legal texts in both form and substance. The Qur’ān was a static text but sparse on details of law.¹¹⁷ The more detailed Sunna was known through a series of scattered *ḥadīth* texts of often dubious authenticity.¹¹⁸ The absence of a single code or document clearly detailing the law always presented questions to jurists’ inquiries as to just what the law was. Case in point: Muslim jurists did not even agree on what counted as *ḥudūd* laws. For example, they disputed whether blasphemy, highway robbery, and even murder were “true” (divinely legislated) *ḥudūd* crimes with fixed punishments—as detailed below.

The jurists did agree that Islamic law specifies at least four *ḥudūd* crimes: illicit sexual relations (such as fornication or adultery), defamation (specifically, slanderous accusations of sexual impropriety), theft, and intoxication.¹¹⁹ By contrast, they treated murder as a quasi-*ḥadd* crime: it was a grave offense punishable by death, but it involved some degree of discretion on the part of the victim’s family to pardon the offender and accept a set amount of financial compensation instead.¹²⁰ This may be surprising to the reader familiar with modern laws of murder as *the* quintessential

115. See *id.* (delineating the duties of jurists versus the executive—the former charged with interpreting the law, the latter with enforcing it); cf. NOAH FELDMAN, *THE FALL AND RISE OF THE ISLAMIC STATE* 44–48 (2008) (describing the jurists-executive division as a separation of powers).

116. See, e.g., MĀWARDĪ, *supra* note 75, at 100–01.

117. See Mottahedeh, *supra* note 66, at 2.

118. *Id.*, at 11–13.

119. For an overview of Islamic criminal laws, see PETERS, *supra* note 74, at 53–65.

120. See *id.* at 38–53 (“In cases of homicide and bodily harm the plaintiffs may demand either retaliation or financial compensation.”).

crime. But the premodern Islamic conception came out of explicit Qur'ānic regulations of existing practices and corresponded to medieval laws of talion, the "eye-for-an-eye" doctrines that specified rules of retaliation or financial compensation for homicide and personal injury.¹²¹ In the study of Islamic law, scholars have likened these rules to tort law rather than criminal law.¹²²

Finally, while the Islamic legal treatises often treated rebellion in sections accompanying criminal law, jurists typically viewed rebellion as a category of *political resistance*, which was not banned or criminalized by the legal sources.¹²³ Rather, the Qur'ān bans brigandry and acts of terrorism, from which rebels were to be distinguished.¹²⁴ As leading scholars of Islamic law have recently shown, medieval jurists developed a highly nuanced jurisprudence on the legality of rebellion and the treatment of rebels in a sophisticated line of thought that reflected Qur'ānic ideals and the historical circumstances of political upheaval and uncertainty in the early Muslim community.¹²⁵

The short list of four or five crimes expanded and contracted as the criminal elements and scope of the laws often depended on the

121. See Elmar Klinger, *Revenge and Retribution*, in 11 ENCYCLOPEDIA OF RELIGION 7779–84 (Lindsay Jones ed., 2d ed. 2005). For examples of differing approaches to vengeance across time and space, see VENGEANCE IN MEDIEVAL EUROPE 87 (Kelly Gibson & Daniel Lord Smail eds., 2009) (medieval period) and MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS (1998) (modern period).

122. For a discussion drawing the comparison between talion and tort in the Islamic law context, see J. N. D. Anderson, *Homicide in Islamic Law*, 13 BULL. SCH. ORIENTAL & AFR. STUDS. 811 (1951). For perspectives on how Islamic law attempted to ameliorate pre-Islamic practices of private administration that often fueled ongoing tribal wars, see PETERS, *supra* note 74, at 38–53 ("The origins of this part of the law go back to the pre-Islamic custom of feuding, which allowed revenge for killing and bodily harm on all members of the tribe of the perpetrator. This often resulted in feuds that could last for generations. These feuds would cease if the victim's family would accept compensation, to be paid collectively by all members of the tribe. With the advent of Islam, this institution of revenge was drastically modified. . . . The most important reforms were that revenge in kind could only be taken on the person of the offender and only after due trial."). For the Qur'ānic regulations, see QUR'ĀN 4:92 (outlining the laws of homicide, including compensatory rules for accidental homicide); *id.* 5:45 (permitting retaliation for personal injury but encouraging financial compensation in its stead: "Whoever forgoes [physical retaliation in the way of charity] it shall be expiation for that person."); *id.* 2:178–2:179 ("[T]here is life for you in *qiyās*, oh people of understanding, so that perhaps you might learn God-consciousness [restraint].").

123. For a detailed treatment of the Islamic laws of rebellion, see generally KHALED ABOU EL FADL, REBELLION AND VIOLENCE IN ISLAMIC LAW (2001) (examining the concept and treatment of political resistance in Islamic law).

124. *Id.* at 32.

125. Cf. Sherman A. Jackson, *Domestic Terrorism in the Islamic Legal Tradition*, 91 MUSLIM WORLD 293–310 (2001) (discussing the correspondence between classic Islamic law and features of domestic terrorism in the United States). See generally ABOU EL FADL, *supra* note 123, at 125 (discussing the role of Muslim jurists in restructuring and constructing a discourse on rebellion).

constructions that jurists gave them.¹²⁶ At times, juristic definitions of *ḥudūd* laws encompassed acts with punishments not explicitly mentioned in the texts of the Qur'ān or Sunna. The two most widespread instances of this were apostasy and highway robbery—both of which were mentioned in the Qur'ān, but without defined punishments.¹²⁷ Though some jurists rejected a criminal categorization for these acts, many jurists nevertheless counted them as *ḥudūd* crimes.¹²⁸

In addition, jurists tinkered with the scope of *ḥudūd* laws by construing certain texts narrowly or broadly. For instance, some jurists counted bestiality or sodomy under the rubric of *ḥudūd* sex crimes while others restricted the *ḥudūd* label to illicit, heterosexual sex acts between two people.¹²⁹ Only Ḥanafīs outlined a robust notion of blasphemy as a crime.¹³⁰ Most jurists regarded sacrilegious statements against the Prophet as mere words that were not tantamount to apostasy, restricting the meaning of apostasy to explicit denials of the existence of God or the prophecy of Muḥammad.¹³¹ The punishments for all of these crimes were severe—they ranged from reprimand, fines, and shaming to imprisonment, corporal punishment, and death.¹³²

Crimes that did not fit under the *ḥudūd* rubric were those that were not clearly specified in the sources and so involved some

126. Intisar A. Rabb, *Doubt's Benefit: Legal Maxims in Islamic Law, 7th–16th Centuries*, 24–25, 263–81 (2009) (unpublished Ph.D. dissertation, Princeton University) (on file with Mudd Library, Princeton University).

127. *Id.*

128. *Id.*

129. *Id.*

130. Intisar A. Rabb, *Speech in Islamic Law and Politics*, in *ISLAMIC AND INTERNATIONAL LAW: SEARCHING FOR COMMON GROUND* (Anver Emon et al. eds., forthcoming 2012).

131. *Id.* For classifications of crimes amongst jurists from the period of the earliest works of law in the eighth century, see for example, 'ABD ALLĀH MUḤAMMAD AL-JUBŪRĪ, 2 *FIQH AL-IMĀM AL-AWZĀ'Ī* 30 (1977) (listing sex crimes, defamation, intoxication, theft—the four agreed-upon crimes—plus apostasy (*riḍḍa*) and highway robbery (*qaṭ' al-ṭariq*)). For classifications as they had developed in the twelfth century, see ABŪ ḤĀMID AL-GHAZĀLĪ, 2 *AL-WAJĪZ FĪ FIQH AL-IMĀM AL-SHĀFĪ'Ī* 163 ('Alī Mu'awwaḍ & 'Ādil 'Abd al-Mawjūd eds., 1997) (listing all seven); IBN RUSHD II, 2 *BIDĀYAT AL-MUJTAHID* 577 ('Alī Muḥammad Mu'awwaḍ & 'Ādil Aḥmad 'Abd al-Mawjūd eds., 2000) (listing eight categories—the seven mentioned plus retaliation (*qiṣās*) for murder or personal injury).

132. See PETERS, *supra* note 74, at 30–38 (listing the penalties: reprimand (*ta'dīb*), fines (*ghurm*, *ursh*), public exposure to shame (*tashhīr*) (which may include shaving the head and parading around town on the back of a donkey), banishment (*nafy*, *taghrīb*), imprisonment (*ḥabs*), flogging (*jald*), amputation of the hand or foot in some cases (*qaṭ'*), cross-amputation (e.g., of the right hand and left foot) (*al-qaṭ' min khilāf*), retaliation (*qiṣās*) or financial compensation (*diyya*) for personal injuries and murder; the death penalty (*qatl*) (through various methods, including lapidation (*rajm*) for adultery), sometimes in combination with crucifixion (*ṣalb*), and other non-punitive legal consequences (e.g., a bar from testifying in court)).

element of discretion—i.e., laws of retaliation (*qiṣās*) and discretionary penalties (*ta'zīr*).¹³³ Retaliation laws were discretionary in that they permitted a victim or her family to decide whether to commute like-for-like retaliation with blood money.¹³⁴ The laws of discretionary penalties comprised the rest of the non-*ḥudūd* criminal laws—a catch-all category of acts that were considered offenses but never defined as such in the sources.¹³⁵ Criminalization of these acts was justified by a combination of prior practices, political prerogative, and arguments about necessity.¹³⁶ Though jurisdiction over these offenses was largely in the purview of political authorities, the jurists defined and specified sentence ranges for these acts too, in their attempts to counter-define the *ḥudūd* laws.¹³⁷

Jurists did not see their interpretive activities as juridical legislation. To the contrary, the sources suggest that they staunchly subscribed to the doctrine of legislative supremacy and saw *ḥudūd* laws as authorized by nothing less than divine origins. Where a critical textualist or common law lawyer might see juridical legislation and common law crimes, most Muslim jurists conceived of themselves as restraining their own discretion and that of the political authorities in deference to the legislative supremacy of God. Yet, the indeterminate nature of the texts, the ambiguities surrounding the definition of the specified crimes compared to real-world acts, and the high stakes of criminal convictions, drove them to develop firm criteria for defining the law, which may have appeared to be legislation in the guise of interpretation. In short, despite—or

133. See *id.* at 65–68 (“Executive officials and judges . . . may, at their discretion, impose corrective punishment on those who have committed such acts.”).

134. Only a minority of jurists placed the laws of *qiṣās* in the *ḥudūd* category. See, e.g., BADR AL-DĪN AL-'AYNĪ, 6 AL-BINĀYA FĪ SHARḤ AL-HIDĀYA 190 (Ayman Ṣāliḥ Sha'bān, 1930) (noting that Bazdawī does so in his *Mabsūṭ*); IBN RUSHD II, *supra* note 131, at 577.

135. PETERS, *supra* note 74, at 65–68.

136. Māwardī maintained that unspecified crimes were punishable at the discretion of a presiding judge according to the policy preferences of the political authority (*siyāsa*) if they constituted behavior that would compromise public order or the public interest (*maṣlaḥa*) that the caliph was charged with upholding. See MĀWARDĪ, *supra* note 75, at 1022 (maintaining that the ruler *must* apply *ta'zīr* punishments in instances that affect the public interest).

137. For the growth of these definitions to accommodate new societal situations and theoretical expansions in one legal school, see for example IBN ḤAJAR AL-HAYTAMĪ, 4 TUḤFAT AL-MUḤTĀJ SHARḤ AL-MINHĀJ 160–64 ('Abd Allāh Maḥmūd Muḥammad 'Umar ed., 2001); YAḤYĀ B. SHARAF AL-NAWAWĪ, 3 MINHĀJ AL-TĀLIBĪN 246 (Aḥmad b. 'Abd al-'Azīz al-Ḥaddād, 2000); ABŪ ḤĀMĪD AL-GHAZĀLĪ, 6 AL-WASĪT FĪ AL-MADHHAB 513–16 (Aḥmad Maḥmūd Ibrāhīm & Muḥammad Muḥammad Tāmīr eds., 1997); MUḤAMMAD ZUHRĪ AL-GHAMRĀWĪ, ANWĀR AL-MASĀLIK SHARḤ 'UMDAT AL-SĀLIK LI-AḤMAD B. AL-NAQĪB 468 (1996); MUḤAMMAD AL-KHAṬĪB AL-SHIRBĪNĪ, 5 MUGHNĪ AL-MUḤTĀJ ILĀ MA'RIFAT MA'ĀNĪ ALFĀZ AL-MINHĀJ 522–26 ('Alī Muḥammad Mu'awwad & 'Ādil Aḥmad 'Abd al-Mawjūd eds., 1994); SHAMS AL-DĪN MUḤAMMAD B. AḤMAD AL-RAMLĪ, 8 NIHĀYAT AL-MUḤTĀJ ILĀ SHARḤ AL-MINHĀJ 18–22 (1938).

rather, because of—the doctrine of legislative supremacy, ambiguity and severity in *hudūd* laws made it crucial for jurists to refine the definitions and theory of Islamic criminal law. They not only had to distinguish *hudūd* laws from other criminal laws conceptually, but they also had to devise some principled means of arguing that they were upholding both the letter and the spirit of all criminal laws in a way that paid due deference to the divine Legislator. It is against this backdrop that the *hudūd* maxim was born.¹³⁸

IV. THE “ISLAMIC RULE OF LENITY”: EQUITABLE EXCEPTIONS TO MANDATORY SANCTIONS

Jurists invoked the *hudūd* maxim—“avoid imposing criminal sanctions in cases of doubt (*idra'ū 'l-hudūd bi'l-shubahāt*)”—widely to avoid imposing penal sanctions.¹³⁹ At the same time, they insisted on the mandatoriness of enforcing *hudūd* laws as rules of obligation binding on the state.¹⁴⁰ If *hudūd* enforcement were mandatory, the widespread invocation of the maxim for *hudūd* avoidance demanded some sort of justification within the general theories of Islamic criminal law and governance. Moreover, if opposition to the government's selective enforcement of *hudūd* laws was at the heart of the jurists' concerns and opposition to the government, they had to announce some principled means to determine when to avoid and when to enforce those laws. Toward that end, jurists elaborated criminal law jurisprudence in principal part *through* the *hudūd* maxim, then used that jurisprudence to articulate and give form to a set of public values they held to be rooted in Islam's constitutional texts.¹⁴¹ I have previously outlined how jurists transformed the *hudūd* maxim into a text, which they placed on par with other foundational texts, thereby conferring on it the legal authority commensurate with its centrality.¹⁴² Here, I detail how they used the

138. Like principles of lenity in the English common-law tradition, the *hudūd* maxim existed and was in use long before it became a formal principle of criminal law that appeared regularly in legal treatises together with justifications and enumerations of its use. See Rabb, *supra* note 77, at 123 (tracking reports of the *hudūd* maxim that attribute its use to the Prophets time and appear in the earliest surviving works of law and *hadīth* from the eighth and ninth centuries).

139. *Id.* at 66.

140. *Id.* at 66, 121.

141. *Id.*

142. See Rabb, *supra* 77, at 69–77, 86–100. A minority of jurists—both in the Sunni and Shī'ī legal traditions—rejected the prophetic attributions of the maxim as a *hadīth*. See, e.g., 'ALĪ B. AḤMAD IBN ḤAZM, 12 AL-MUḤALLĀ BI'L-ĀTHĀR 57–63 ('Abd al-Ghaffār Sulaymān al-Bandārī ed., 1988); IBN ḤAZM, 7 AL-IḤKĀM FĪ UṢŪL AL-AḤKĀM 454–55 (1968) (complaining that applications of the *hudūd* maxim were lawless because they contradicted the authentic texts of Islamic criminal law and would lead to a complete cancellation of *hudūd* laws); cf. AL-ḤURR AL-'ĀMILĪ, 18 WASĀ'IL AL-SHĪ'A 127–

ḥudūd maxim to form a jurisprudence that privileged principles of equity and fairness in the interpretation and application of criminal law.

A. Equity Rationales

Muslim jurists used the *ḥudūd* maxim often as an equitable principle to smooth over rigidities in tight applications of the text. That is, they invoked the maxim whenever a failure to do so threatened certain sensitive “rights” or substantive values underlying Islamic law. Before arriving at that point, they had to first identify the rights and moral values enumerated by Islam’s foundational sources, the Qur’ān and the Sunna, then devise a theory for how to balance one set of rights over another. That endeavor took place in two stages, all within the context of the jurists’ continuing commitment to the theory of divine legislative supremacy. The first stage put the divine front and center; it was a God-centered theory of *ḥudūd* laws that laid the foundation for the second stage. That second stage featured arguments that were in large part human-centered and counter-intuitively deployed as a way of better vindicating what jurists took to be divine concerns with equity and justice.

1. A Theological Theory of *Ḥudūd* Laws: Rules of Moral Obligation

In addition to distinguishing *ḥudūd* laws from other criminal offenses by defining them as acts that involved no measure of human discretion (unlike *qiṣās* and *ta’zīr*: retaliation and discretionary penalties), jurists came to conceive of *ḥudūd* laws as rules of moral obligation. They initially articulated this notion through a doctrine contrasting a conception of *ḥudūd* laws as “God’s claims” or “rights” (*ḥuqūq Allāh*) with other laws, deemed “individual claims” or “rights” (*ḥuqūq al-nās*).¹⁴³ These Muslims of the first three centuries did not mean claims or rights in the sense used in modern Western liberal traditions.¹⁴⁴ Rather, early scholars understood these concepts in theological terms. Islamic theological notions of law defined legal

29 (‘Abd al-Raḥīm al-Rabbānī al-Shīrāzī ed., 1963-1969) (restricting the scope of *ḥudūd* avoidance to factual rather than legal doubt based on competing traditions that advise a rule of precaution rather than lenity in the face of legal doubts).

143. See, e.g., Miriam Hoexter, *Huqūq Allāh and Huqūq al-‘Ibād as Reflected in the Waqf Institution*, 19 JERUSALEM STUD. ARABIC & ISLAM 133, 134 (1995); Baber Johansen, *Sacred and Religious Element in Hanafite Law—Function and Limits of the Absolute Character of Government Authority*, in ISLAM ET POLITIQUE AU MAGHREB 281, 299–300 (Ernest Gellner & Jean-Claude Vatin eds., 1981) (analyzing the relationship between “the claims of God and the claims of men”).

144. For further discussion of *ḥuqūq* generally, see ENCYCLOPEDIA OF ISLAM (P. Bearman et al. eds., 2d ed. 2006) (s.v. *huqūq*).

duties simply as a general human obligation to follow the law as an act of worship: God has a right to be worshipped, and individuals who fulfill their duties of worship have a corresponding right not to be punished. In other words, *hudūd* laws represent God's claims in the sense that they are rules of obligation legislated by God for which obedience is due.¹⁴⁵

Jurists writing in the two major strands of Islamic theology—Sunnī traditionalism and Shī'ī or Mu'tazilī rationalism—came to this same conclusion, albeit by different means.¹⁴⁶ Traditionalists believe that God has a prerogative to declare law.¹⁴⁷ Thus, they allowed for *seeming* injustices according to a definition of justice that only God could understand.¹⁴⁸ In their estimation, God demanded absolute obedience through adherence to the law (in this case *hudūd* laws), which itself defines morality. Adherence to the law meant adherence to morality, which should save people from punishment in the afterlife.¹⁴⁹ It is on this basis that one jurist explained *hudūd* laws as God's rights with reference to the following *hadīth*: "Surely, the 'right' (*haqq*) of God upon His servants is that they worship Him and do not associate any partners with Him [in part, through following *hudūd* laws], and the 'rights' (*huqūq*) of individuals vis-à-vis God is that whoever refrains from associating partners with God will not be punished."¹⁵⁰

For rationalists, by contrast, justice and morality were objective concepts: God only creates rules that are moral and collective reason usually can discern morality, and thus the law.¹⁵¹ Rationalists maintained that out of His grace, God sent Prophets (and Imāms) to clarify the law.¹⁵² Accordingly, God holds Himself to a divine self-promise to punish only objectively bad acts and reward good ones—which is exactly the sense of justice that the human mind comprehends.¹⁵³ In juristic writings, this rationalist approach to law

145. Several scholars observe that *hudūd* enforcement is obligatory because these crimes and punishments fall within the scope of *huqūq* Allāh. *E.g.*, FAKHR AL-DĪN AL-ZAYLA'Ī, 3 TABYĪN AL-HAQĀ'IQ 539 (2000); AHMAD B. YAḤYĀ AL-WANSHARĪSĪ, 'UDDAT AL-BURŪQ FĪ JAM' MĀ FĪ-'L-MADHHAB MIN AL-JUMŪ' WA'L-FURŪQ 671 (Ḥamza Abū Fāris ed., 1990); BURHĀN AL-DĪN AL-MARGHĪNĀNĪ, 2 AL-HIDĀYA SHARḤ BIDĀYAT AL-MUETADI' 381 (Muḥammad 'Adnān Darwīsh ed., 1966).

146. For a survey of the major theological strands in early Islamic thought, see generally J. VAN ESS, THEOLOGIE UND GESELLSCHAFT IM 2. UND 3. JAHRHUNDERT HIDSCHRA: EINE GESCHICHTE DES RELIGIÖSEN DENKENS IM FRÜHEN ISLAM (1991).

147. See Rabb, *supra* note 126, ch. 6.

148. *Id.*

149. *Id.*

150. SHIHĀB AL-DĪN AL-QARĀFĪ, 1 ANWĀR AL-BURŪQ FĪ ANWĀ' AL-FURŪQ 269–70.

151. See Rabb, *supra* note 126, ch. 6.

152. *Id.*

153. See MĀNKDĪM SHASHDĪW, TA'LĪQ 'ALĀ SHARḤ AL-UṢŪL AL-KHAMSA 207–33, 344–48, 434–79 ('Abd al-Karīm 'Uthmān ed., 1965) (published as 'Abd al-Jabbār b.

is famously encapsulated in the *principle of correlation* between revelation and reason: “whatever reason dictates, the Lawgiver legislates.”¹⁵⁴ For rationalists, this principle applied to *hudūd* laws no less than any other.

The theological conceptions of law then place all *hudūd* laws into the category of God’s claims or rights in the sense of individual and collective *obligations*. The two differing trends merely explain why the obligations are due, in many ways mirroring the old split between natural law theorists and positivists in modern common and civil law contexts.¹⁵⁵ For the government and legal spheres, both held a conception of *hudūd* that required individuals and political authorities alike to obey and implement *hudūd* laws as obligatory acts of worship. That is, individuals were to avoid committing *hudūd* offenses, and political authorities were obliged to punish those who committed them. The early legal scholars and theologians maintained that, only in this way would Muslim societies give shape to the moral order that God legislated through *sharī‘a*. This, at least, is the theological notion of *hudūd* laws-as-moral obligation.¹⁵⁶

2. A Legal Theory of *Hudūd* Laws: Crimes as Public-Moral Offenses

Over time, jurists elaborated a more sophisticated notion in which they took the God’s rights–individual rights dichotomy to refer to the public-versus-private nature of the interest offended by commission of a crime. *Hudūd* crimes violate God’s rights, they argued, in the sense of offending public morality.¹⁵⁷ They developed

Ahmad, *Sharḥ al-uṣūl al-khamsa, as clarified by D. Gimaret, Les uṣūl al-ḥamsa du Qāḍī ‘Abd al-Gabbār et leurs commentaires*,” 15 ANNALES ISLAMOLOGIQUES, 47, 49 (1979)).

154. See MODARRESSI, *supra* note 98, at 4 (describing the principle of correlation as “religious rules [that] may be inferred from the sole verdict of reason”).

155. Compare JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980) (expressing rights in terms of natural law), with HART, *supra* note 64 (defining the obligation to obey the law with respect to rules from some recognized, authoritative “legislative” source).

156. For discussions of individual and government duties with respect to criminal law, see MĀWARDĪ, *supra* note 103, at 250 (including enforcement of *hudūd* laws in a short list of ten public duties that the executive authority of the state must fulfill); cf. ABŪ YA’LĀ IBN AL-FARRĀ’, AL-AḤKĀM AL-SULTĀNIYYA 27 (Muḥammad Ḥamīd al-Fiqī ed., 1966) (same).

157. See Hoexter, *supra* note 143, at 133 (“*Huqūq Allāh* refers to the rights of the Islamic community and religion and their claims upon the individual.”); Johansen, *supra* note 143, at 302 (arguing that Hanafis established the *huqūq Allāh-huqūq al-‘ibād* distinction to account for “political justice in the name of God” and to alleviate tensions between the “private and individualistic character of Hanafite law” and “the public interest”). For an alternative view, see Anver Emon, *Huqūq Allāh & Huqūq al-‘Ibād, A Legal Heuristic for a Natural Rights Regime*, 13 ISLAMIC L. & SOC’Y 325 (2006) (arguing that the Muslim jurists invented the doctrine of *huqūq Allāh* as an interpretive mechanism used to create and distribute rights, duties, and public

this argument with reference to both substantive and procedural aspects of Islamic law.

Substantively, by the eleventh century, jurists extracted from Islamic law five core public values, which they called “objectives of the law: *maqāṣid al-sharī‘a*.”¹⁵⁸ These jurists maintained that these objectives were intended to promote the preservation of life, religion, soundness of intellect, lineage, and property.¹⁵⁹ They mapped these values onto criminal law rules, which they took as the best exemplar for promoting Islam’s core values.¹⁶⁰ For example, in their conception, the laws of retaliation could help preserve life by limiting opportunities for vigilante bloodshed and blood feuds of the type that occurred in the pre-Islamic period.¹⁶¹ Apostasy laws could help maintain Islamic religious identity, from a time when conversion entailed a change in political loyalty.¹⁶² Prohibitions on intoxicants could help preserve the dignity of individuals in public space.¹⁶³ Rules against sex crimes could help preserve ties of lineage and honor—ties that the sources reveal to have been extremely important in medieval Arab societies.¹⁶⁴ And the laws against theft, fraud, highway robbery, and the like promoted the sanctity of private property.¹⁶⁵

With these values in mind, the import of *hudūd* crimes went far beyond offenses against individual victims; they also infringed on the sense of security and preservation of Islamic law’s five core values. Adultery is a telling example. Muslim jurists considered adultery less an offense against the faithful spouse (i.e., a violation of a private interest) than against the notion of open infidelity (i.e., a violation of the public interest) in a system where marriage is the primary way to make sexual relations licit.¹⁶⁶ So concerned were jurists with avoiding punishment when the public interest was left undisturbed, that they tied their own hands in many cases that bore the harshest punishments, like sex crimes. The legal texts forbid fornication and adultery and a guilty verdict carried penalties ranging from flogging to death; but the texts also establish stiff evidentiary requirements to prove the offense—four eye-witnesses—thereby limiting the instances

commitments through natural law reasoning to justify rules that had no basis in Qur’ān or Sunna).

158. See GHAZĀLĪ, *supra* note 131; cf. AL-FĀDĪL AL-MIQDĀD AL-SUYŪRĪ, NAḌD AL-QAWĀ’ID AL-FIQHIYYA ‘ALĀ MADHHAB AL-ĪMĀMIYYA 60–63 (‘Abd al-Laṭīf al-Kūhkamārī Maḥmūd al-Mar’ashī, 1983) (mentioning the five as *naḥs*, *dīn*, *‘aql*, *nasab* or *‘ird*, and *māl*).

159. See, e.g., SUYŪRĪ, *supra* note 156, at 60–63.

160. *Id.*

161. *Id.* at 60.

162. *Id.* at 61.

163. *Id.* at 61–62.

164. *Id.* at 62.

165. *Id.* at 62–63.

166. See Rabb, *supra* note 126, at 169–70.

for finding *ḥadd* liability.¹⁶⁷ Jurists further interpreted these texts to severely circumscribe means of valid prosecution in other ways. As noted, some limited the definition of fornication to the literal terms of penetration between a man and a woman; every other case was deemed doubt-ridden to a level sufficient to make the *ḥudūd* maxim apply to bar the sanction.¹⁶⁸ Some also determined that judges could only impose punishment with uncoerced, multiple sworn confessions or testimony from four witnesses to the act of penetration, who offering uniform details of the time, manner, and place of the act.¹⁶⁹ Moreover, jurists encouraged sex offenders not to disclose their illicit affairs,¹⁷⁰ and they constructed an elaborate law of privacy designed to prevent political authorities from prosecuting anything but brazen, public sex acts.¹⁷¹ They instituted a host of additional evidentiary safeguards as well, including rules restricting the acceptance of confessions, disallowing verdicts based on judicial notice, and limiting the use of circumstantial evidence.¹⁷²

In other words, *ḥudūd* crimes like fornication or adultery were punishable only when they were so public as to meet the most stringent of standards of proof, thereby infringing on the public values that the *ḥudūd* prohibitions aimed to protect. Jurists applied similar arguments to the range of *ḥudūd* laws to articulate the moral norms and public values at stake when each crime was committed.¹⁷³

167. *Id.*

168. *Id.*

169. *See, e.g.,* ABŪ IBRĀHĪM ISMĀ'ĪL B. YAḤYĀ AL-MUZANĪ, 9 MUKHTAṢAR 276 (Ḥusayn 'Abd al-Hamīd Nīl ed., 1993); Ibn Bābawayh, *Hidāya*, in 23 SILSILAT YANĀBĪ' AL-FIQHIYYA 19 ('Alī Aṣghar Murwārīd ed., 1990); MARGHĪNĀNĪ, 4 HIDĀYA, *supra* note 145, at 129.

170. *E.g.,* IBRĀHĪM B. MUHAMMAD AL-BĀJŪRĪ, ḤASHIYAT FATH AL-QARĪB 384 (1974) (“[W]hoever publicizes or makes known his sexual transgression incurs [eligibility for] the *ḥadd* punishment.”); ZAYLA'Ī, *supra* note 145, at 341–42 (arguing that the law encourages sex crimes to be kept private (and essentially non-prosecutable), as four witnesses to the act would be exceedingly rare).

171. *See generally* Eli Alshech, “Do Not Enter Houses Other Than Your Own”: *The Evolution of the Notion of a Private Domestic Sphere in Early Sunnī Islamic Thought*, 11 ISLAMIC L. & SOC'Y 291 (2004) (discussing conceptions of domestic privacy in Islamic law). For a useful discussion of how Islamic privacy laws played out in sodomy cases, see Seema Saifee, Note, *Penumbra, Privacy, and the Death of Morals-Based Legislation: Comparing U.S. Constitutional Law with the Inherent Right of Privacy in Islamic Jurisprudence*, 27 FORDHAM INT'L L.J. 370, 446–48 (2003) (comparing Islamic legal contexts with the rule announced in *Lawrence v. Texas*, 539 U.S. 558 (2003)).

172. *E.g.,* IBN IDRĪS AL-HILLĪ, 3 KITĀB AL-SARĀ'IR 537 (1989) (noting exceptions to the Sunnī bar on judicial determinations by private knowledge for offenses against *ḥuqūq Allāh*); SHAMS AL-A'IMMA MUḤAMMAD B. AḤMAD AL-SARAKHSĪ, 9 MABSŪṬ 43, 43–106 (Abū 'Abd Allāh Muḥammad Ḥasan Ismā'īl al-Shāfi'ī ed., 2001). For a basic overview of criminal procedure, see PETERS, *supra* note 74, at 8–17, 79–92, 142–48 (detailing criminal procedure in classical Islamic doctrine, the pre-modern period, and modern Islamic criminal law) and MAḤMAṢĀNĪ, *supra* note 78, at 325–76.

173. *See infra* notes 196–207 and accompanying text.

Some traditionalists even insisted that prohibitions offending no clear private interest—so-called victimless crimes like intoxication laws—were not instituted for their own sake or any intrinsic moral value, but primarily for the preservation of public order.¹⁷⁴

A possible conceptual wrinkle in this public–private scheme involved the laws of defamation, which Muslim jurists struggled to smooth for several centuries.¹⁷⁵ To many, a slanderous accusation seemed more a private affront than a public one, which thus called into question the classification of this *ḥadd* crime as a violation of God’s public rights. What public interest was threatened by the intensely personal slight caused by defamation? Prior to the eleventh century, sources specified the punishment for defamation without making *ḥuqūq* classifications, as they were written before the *ḥuqūq Allāh-ḥuqūq al-nās* theory was fully elaborated. If anything, the sources suggested that the offense was private.¹⁷⁶

By the middle of the eleventh century, however, jurists had developed a third category of “mixed claims” in which either God’s claims or private interests dominated.¹⁷⁷ Through this new concept, jurists aimed to overcome the inconsistency between the private characteristics of defamation and the theory that all *ḥudūd* laws fell into the public *ḥuqūq Allāh* category.

Defamation proceedings typically worked in the following way: a plaintiff initiated an indictment by petitioning the court, producing evidence of the defamatory statement.¹⁷⁸ Punishment was then due unless there was a fatal flaw in the evidence or the law otherwise provided for mitigation.¹⁷⁹ One mitigation provision involved disputed effects of a plaintiff’s decision to pardon the offender.¹⁸⁰ Jurists debated heatedly whether pardons of this type sufficed to avert the

174. *E.g.*, WANSHARĪSĪ, *supra* note 145, at 683–84 (noting a Mālikī view that the law does not prohibit wine drinking for its own sake, but aims to deter the harms to the public sphere that accompany excessive drinking and addictive behavior).

175. *See* QUR’ĀN 24:4 (prohibiting false allegations of sexual impropriety and specifying eighty lashes as the fixed, mandatory sentence associated with proved utterance of such defamatory statements). For prohibitions in the *ḥadīth* literature, see for example IBN ABĪ AL-QĀSIM, 4 AL-WĀDIḤ FĪ SHARḤ MUKHTAṢAR AL-KHIRAQĪ 421, 421–22 (‘Abd al-Malik b. ‘Abd Allāh b. Duḥaysh ed., 2000) (citing a prophetic *ḥadīth* instructing Muslims to “[a]void seven grave sins . . . [including] and falsely accusing unsuspecting, chaste, believing women”).

176. For instance, Shāfi’ī maintains that *ḥudūd* laws were legislated for the benefit of the plaintiff or victim. MUZANĪ, *supra* note 169, at 277 (citing Shāfi’ī’s later opinion).

177. *See, e.g.*, Hoexter, *supra* note 143, at 134; sources cited *supra* note 143.

178. *See* Rabb, *supra* note 130, at *19.

179. *Id.*

180. *Id.*

punishment.¹⁸¹ This debate turned on whether defamation was an offense against private interests offending only the interests of the addressee, or against public interests offending one of *God's* rights. If private, plaintiff pardons should drop the punishment. If, on the other hand, the crime was public, plaintiff pardons should have no effect.¹⁸²

Most jurists then applied this new category to defamation proceedings in a way that further elucidated *hudūd* laws as “God’s rights” that were both public and moral offenses, yet recognized the private nature of defamatory acts. As usual in Islamic law, jurists generated a plurality of opinions about just how defamation fit into the theory of *hudūd* laws. The balance of private and public moved on a sliding scale. Shāfi’ī jurists categorized defamation as almost exclusively a private offense.¹⁸³ Thus, they allowed *hudūd* punishments to drop with plaintiff pardons.¹⁸⁴ But they required *some* punishment to apply once the case was brought before a court—as a public tribunal—and proved.¹⁸⁵ Mālikī jurists outlined a similar scheme, also asserting that private claims preponderate in defamation cases.¹⁸⁶ Their approach allowed plaintiff pardon to drop the punishment only if she desired to quash an indictment in order to protect her reputation.¹⁸⁷ But as with the Shāfi’īs, Mālikīs held that once the indictment had reached the courts, the private nature of the

181. *Id.*

182. There are at least four ways that punishment could drop: (1) plaintiff pardon or voluntary forfeiture of her right to bring a claim; (2) truth (*taṣdīq*), that is, if the defendant can prove that the allegedly false statement was actually true; (3) exculpatory evidence in the defendant’s favor to show, for example, that the defendant did not make the alleged statement; and (4) mutual imprecation, a process between husband and wife whereby, in the face of suspicions or accusations of sexual impropriety, each could be exonerated by both parties swearing four times that their respective statements were true and a fifth time invoking the curse of God if they were lying. *See, e.g.,* MAR’Ī B. YŪSUF AL-MAQDISĪ, DALĪL AL-ṬĀLIB ILĀ NAYL AL-MUṬĀLIB ‘ĀLA MADHHAB AL-IMĀM AL-MUBAJJAL AḤMAD B. ḤANBAL 254–55 (‘Abd Allāh ‘Umar al-Bārūdī ed., 1975); ZAYN AL-DĪN IBN NUJAYM, 1 AL-AŠHBĀH WA’L-NAZĀ’IR 188 (Muḥammad Muṭī’ al-Ḥāfiẓ ed., 1983); ABŪ JA’FAR AḤMAD AL-TAḤĀWĪ, MUKHTAṢAR 266 (Abū al-Wafā’ al-Afghānī ed., 1950). A fifth, disputed means of dropping the *ḥadd* punishment was repentance. *See, e.g.,* MĀWARDĪ, *supra* note 75, at 818 (Shāfi’ī jurist challenging the mainstream Ḥanafī position that *hudūd* punishments could not drop by repentance).

183. *See* Rabb, *supra* note 130, at *19–20.

184. *Id.*

185. *See, e.g.,* MĀWARDĪ, *supra* note 75, at 212–13 (classifying defamation under *ḥuqūq al-‘ibād*). *But see* MĀWARDĪ, *supra* note 103, at 433–34 (maintaining that the state must impose some punishment for a defamation case proved before a tribunal because of the *ḥuqūq al-Allāh* element mandating punishing *hudūd* offenses). Judges could completely waive punishments only in limited circumstances, as when political authorities made a policy decision that doing so was in the public interest. MĀWARDĪ, 2 KITĀB AL-ḤUDŪD, *supra* note 75, at 1023–24.

186. *See* Rabb, *supra* note 130, at *19–20.

187. *See id.*

claim actually transferred to the public sphere, and private pardon could no longer have any legal effect.¹⁸⁸

Ḥanafī jurists were most attentive to the public law aspects of the offense. They classified defamation as falling either exclusively in the divine claims category (in line with all other *ḥudūd* crimes) or as a mixed claim in which God's claims dominated.¹⁸⁹ Accordingly, plaintiff pardon did not affect the mandatory nature of punishment and was in fact deemed invalid.¹⁹⁰ Leading Ḥanafī jurists justified this position by explaining the public interests intrinsic to *ḥudūd* laws. As a matter of God's claims, the public interest required the state to strictly uphold these laws in order to prevent corruption in society and protect the sanctity of individuals' personal security, property, and reputational interests on a society-wide scale.¹⁹¹ In the end, an individual could only defend her reputation (her private interest) if she had some assurance that the state would enforce the *ḥudūd* laws (in the public interest). So, Ḥanafīs concluded, defamation laws were for all intents and purposes matter of public law.¹⁹²

Ḥanbalī jurists were the exception to the orientation that saw in defamation public law relevance. They maintained that defamation offends only individual interests.¹⁹³ Accordingly, a *ḥadd* sentence could drop simply with a plaintiff's pardon.¹⁹⁴ Significantly, Ḥanbalī jurisprudence reflects the traditionalist orientation of their school, which never developed a notion of public-private rights that moved beyond the early tradition-based theological conceptions of obligations.

188. See ABŪ BAKR B. AL-'ARABĪ, 3 AḤKĀM AL-QUR'ĀN 344 (classifying defamation as an offense where *ḥuqūq al-'ibād* preponderates); IBN RUSHD II, *supra* note 131, at 645–48 (same); AḤMAD B. YAḤYĀ AL-WANSHARISĪ, 8 MĪ'YĀR AL-MU'RIB WA'L-JĀMĪ' AL-MUGHRIB 'AN FATĀWĀ AHL İFRĪQIYA WA'L-ANDALUS WA'L-MAGHRIB 422 (Muḥammad Ḥajjī ed., 1981) (noting that the private *ḥuqūq al-'ibād* aspects of defamation become public *ḥuqūq Allāh* concerns once a case enters the court as a public tribunal).

189. See Rabb, *supra* note 130, at *23–27.

190. See, e.g., ABŪ BAKR AL-KĀSĀNĪ, 9 BADĀ'Ī' AL-ṢANĀ'Ī' (Aḥmad Mukhtār 'Uthmān ed., 1968) 4212–13 (noting that the only real difference between defamation and other *ḥudūd* offenses implicating private—rather than divine—interests is that, once established, defamation cannot be quashed by retraction of confession). *But see* ZAYLA'Ī, *supra* note 145, at 341 (observing Bazdawī's minority position to the contrary, i.e., that defamation affects private interests).

191. See Rabb, *supra* note 130, at *19–20.

192. See, e.g., KĀSĀNĪ, *supra* note 190, at 4202–03 (analogizing defamation to theft, which also affects individual interests but is treated as a crime of *ḥuqūq Allāh* for which punishment is mandatory because of the deterrent effect in the public sphere).

193. See *supra* note 190.

194. E.g., MAQDISĪ, *supra* note 182, at 254; see, e.g., ḤASAN B. AḤMAD IBN AL-BANNĀ', KITĀB AL-MUQNI' FĪ SHARḤ MUKHTAṢAR AL-KHIRAQĪ 1123 ('Abd al-'Azīz b. Sulaymān b. Ibrāhīm al-Ba'īnī ed., 1993); MUWAFFAQ AL-DIN IBN QUDĀMA, 12 AL-MUGHNI' ALĀ MUKHTAṢAR ABI AL-QĀSIM AL-KHIRAQĪ 277–78 ('Abd al-Muḥsin al-Turkī & 'Abd al-Fattāh Muḥammad al-Ḥulw eds., 1986).

The mixed claims category advocated by most Islamic legal schools stuck. Through it, Muslim jurists successfully negotiated the relationship between plaintiff pardon—which used to drop *hadd* liability altogether—and the mandatory nature of *hudūd* laws. Their compromise was that the *hadd* punishment could drop by plaintiff pardon so long as the matter remained between the two parties. Once the matter reached the courts, the punishment could not drop. In developing the mixed claims category of defamation, jurists emphasized the *public* aspect of defamation as a moral offense—that is, once in a public tribunal—for an act that was otherwise considered private. They extended this same understanding in their approach to other *hudūd* laws, balancing between public and private interests. That is, they constructed a two-faceted sense of most *hudūd* laws under which punishment for *hudūd* violations continued to be mandatory, but only where they affected the public sphere.

The sources for pre-modern Islamic criminal law theory show the public-private nature of the *huqūq Allah-huqūq al-nās* framework of sex crimes and other *hudūd* laws, and makes some sense of the high evidentiary standards that otherwise seem so paradoxical.¹⁹⁵ More broadly, they show how jurists used criminal law to articulate Islam's five core "objectives" with emphasis on the public sphere of their times. This scheme reflected the core values of the societies from which the jurists emerged and wrote in issuing their interpretations of Islamic law.

3. Giving Primacy to Private over Public, Individual over God

After the eleventh century developments in the concepts of public versus private, there was one sense in which jurists continued to maintain the mandatory nature of *hudūd* laws through the earlier theological-structural view of these laws as rules of obligation. But in another sense, the jurists had articulated a public-moral theory of *hudūd* laws that grappled with the idea of individual interests within the theological-structural framework. The *hudūd* maxim could accommodate both, and jurists used it to carve out exceptions to the rule of mandatory enforcement.

Recall that the *hudūd* maxim counsels jurists to "avoid criminal sanctions in cases of doubt."¹⁹⁶ The jurists gave teeth to this formulation by privileging the public-moral values that the *hudūd*

195. Cf. LESLIE P. PIERCE, *MORALITY TALES: LAW AND GENDER IN THE OTTOMAN COURT OF AINTAB* 353 (2003) ("The rules of Islamic jurisprudence on bringing accusation of zina were so strict that some scholars of these texts have assumed that the courts would never see instances of adultery, fornication, or rape It is therefore a paradox of Islamic jurisprudence that it set up obstacles to the enforcement of the sexual probity it mandated.").

196. See *supra* notes 9, 76 and accompanying text.

laws were supposed to uphold, insofar as they gleaned them from the Lawgiver, with respect to private and public interests. Avoiding the Lawgiver's specific sanctions in favor of more general values sounds counterintuitive, but it follows the logic of *ḥudūd* laws as deterrents meant to champion public values.¹⁹⁷

When a matter became so public that societal claims were at stake and an accused defendant clearly had violated the law, premodern Muslim jurists held that there was no individual harm that the law must consider in their calculus of whether to apply *ḥudūd* sanctions.¹⁹⁸ The *Case of the Drunken Orphan* in medieval Islamic Iraq demonstrates the point.¹⁹⁹ A man came to the judge Ibn Mas'ūd with his drunken nephew asking that the boy be punished for being a drunkard.²⁰⁰ Protesting but apparently confessing to the charge, the young man accused his uncle of being the worst guardian.²⁰¹ "You neither disciplined me nor covered my sin!" he censured, alluding to the general encouragement to avoid bringing criminal acts into the public sphere.²⁰² The judge ruled that, while "God is (quick to) pardon and loves pardon," a judge must impose the appropriate punishment for a *ḥadd* violation once it is raised in court and proved.²⁰³ He imposed the punishment for drunkenness, forty lashes, because the matter had become one of public record, the offense was proved, and lack of self-discipline was not a valid excuse for avoiding enforcement of the *ḥadd* punishment.²⁰⁴

By contrast, doubts or ambiguities in the law or the evidence could raise questions about individual culpability, which in turn would raise questions about the validity of punishing an individual whose conduct was only dubiously criminal or who was only dubiously liable. In other words, prosecution in such doubtful cases would run the risk of violating an individual's personal entitlement to be free from harm when he is not in fact criminally culpable. For example, in another case in medieval Syria, a petitioner brought a theft complaint against a man whom he found with his belongings that he alleged had been stolen from him.²⁰⁵ The judge suggested that

197. See, e.g., MUHAMMAD B. IDRĪS AL-SHĀFI'Ī, 8 UMM 288 (Maḥmūd al-Muṭraḥī ed., 1993) (describing two purposes of *ḥudūd* laws as (1) severe punishments designed to deter crime, and (2) spiritual purification or rehabilitation); MAWARDĪ, *supra* note 75, at 99 ("*Ḥudūd* are punishments by which God deters people from committing prohibited [acts] and encourages them to follow [His] commands.")

198. See, e.g., Rabb, *supra* note 126, at 248 n.45.

199. See BAYHAQĪ, *supra* note 80, no. 17391.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. See WAKĪ', *supra* note 85, at 617 (detailing the case presided over by Faḍāla b. 'Ubayd al-Anṣārī).

the defendant had merely happened upon the stolen goods, and although appearances made it seem that the defendant had stolen them, there was no clear proof that he did.²⁰⁶ The judge was wary of imposing the *ḥadd* punishment for theft and released the defendant because he feared infringing on the accused's interests in a case where a theft had occurred, but had not occurred so publicly or certainly traceable to the defendant that it warranted imposition of *ḥudūd* laws.²⁰⁷

As it turns out, the *ḥudūd* maxim barred *ḥudūd* sanctions when there was ambiguity about which "public rights" were at stake, but operated less expansively when "private rights" were at stake.²⁰⁸ In other words, whenever the more specific private interest was placed against the non-specific public interest, the private interest always took the upper hand. In this way, judges avoided impinging on the individual "rights" to life, religion, dignity, honor, and property that they saw the law to be designed first and foremost to uphold.

Muslim jurists of the time further explained the *ḥudūd* maxim in equitable terms when describing how it applies to a conflict of texts—one permitting an act, the other prohibiting it and attaching criminal consequences. These types of cases are described in further detail below, as they involve issues of interpretive ambiguity as it relates to fair notice concerns. For now, suffice it to say that scholars invoked the *ḥudūd* maxim with respect to equitable principles delineated in such instances as well. For example, one scholar explained that the *ḥudūd* maxim "takes precedence . . . because the greater interest (of the law) is in preservation of life."²⁰⁹ Moreover, he added, "*ḥudūd* (sanctions) are harsh; they must not be enforced unless there is a complete crime *proved*."²¹⁰ In other words, leading jurists maintained that the value placed on private interests and the high stakes of a *ḥudūd* conviction required "*ḥudūd* laws to be construed with 'lenity.'"²¹¹

The point, jurists intimated, was *not* to impose the *ḥudūd* sanctions as much as possible. In fact, an oft-quoted version of the *ḥudūd* maxim advised the exact opposite: "Avoid imposing *ḥudūd* punishments on Muslims as much as you can; if there is an exculpating cause for [the accused], then release him, as it is better that the Imām make a mistake in pardoning than in punishing."²¹²

206. *Id.*

207. *Id.*

208. Rabb, *supra* note 126, at 173.

209. 'IZZ AL-DĪN IBN 'ABD AL-SALĀM, 2 AL-QAWĀ'ID AL-KUBRĀ 279–80 (Nazīh Kamāl Ḥammād & 'Uthmān Jumu'a Ḍāmīriyya eds., 2007) (giving an example of a marriage of disputed validity).

210. *Id.* (emphasis added).

211. *E.g.*, WANSHARISĪ, *supra* note 145, at 683–84 ('*alā 'l-ta'āḥ al-muḥlaq*).

212. *See, e.g.*, BAYHAQĪ, *supra* note 80, nos. 17057–58; ABŪ BAKR IBN ABĪ SHAYBA, 9 MUṢANNAF 360, no. 28972 (Muḥammad b. Ibrāhīm al-Lāhidān & Ḥamad b.

Accordingly, jurists maintained that the fundamental impetus behind Islam's criminal law system was to use the threat of *hudūd* sanctions to deter and punish proved criminal offenses, but to use the *hudūd* maxim equitably to uphold the law's fundamental values, which gave primacy to individual private interests when there was no clear threat to the public sphere.

B. Fairness Rationales

In addition to using it as a tool for equitable readings, Muslim jurists of the early period also used the *hudūd* maxim to promote values of fair notice. One way of making certain that offenders were fairly punished was to read a *mens rea* requirement into the law, as jurists of the English common law would later come to do.²¹³ Another way of ensuring fair notice was to articulate a theory of ambiguity that accounted for the fluid nature of Islamic legal texts, for as we have seen, it was often difficult for jurists to agree on the contours of even *hudūd* laws as specimens of clear statements of law.²¹⁴ Muslim jurists used the *hudūd* maxim to pursue both strategies. For them, the maxim meant that *hudūd* sanctions applied only if it could be proven that a defendant had *intentionally* violated a *clear* law.²¹⁵ Accordingly, the *hudūd* maxim applied easily to laws that, at least from a jurist's perspective, were objectively ambiguous. Jurists also used the maxim to count reasonable mistake of law, ignorance, and mistake of fact claims as the type of doubt—from the individual offender's perspective—serious enough to bar punishment.²¹⁶

1. A Broad Theory of Doubt: Legal Pluralism and Interpretive Ambiguity

Islamic law notions of clarity and ambiguity outline a wide range to account both for the fluid nature of Islamic legal texts and the

'Abd Allāh al-Jumu'a eds., 2004) (same); 'ABD AL-RAZZĀQ AL-ŞAN'ĀNĪ, 10 MUŞANNAF 166, no.18698 (Ayman Naşr al-Dīn al-Azharī ed., 2000) (same); MUHAMMAD B. 'ĪSĀ AL-TIRMIDHĪ, 5 SUNAN 112–13 no. 1424 (1965–1969) (same).

213. See, e.g., *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436 (1978) (“[T]he familiar proposition that ‘existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.”) (citations omitted); *Morissette v. United States*, 342 U.S. 246, 250 (1952) (“The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.”).

214. See *supra* note 138 and accompanying text.

215. Rabb, *supra* note 77, at 68.

216. See Rabb, *supra* note 126, at 263–90, 293–300.

multiple schools of interpretation that help to define those texts. Typically, textual ambiguity covers situations where the law is silent as to the legality of particular acts, or where there is a conflict of texts.²¹⁷ A good example concerns male sodomy, which was an especially thick bone of contention between the Ḥanafī and Shāfi'ī schools.²¹⁸ The Ḥanafīs argued that the Qur'ān specified a punishment for *zinā* (male-female sex acts outside of marriage) but was silent on sodomy.²¹⁹ Thus by definition, they maintained that sodomy could not be a *ḥadd* crime.²²⁰ But the Shāfi'īs disagreed on the basis that the Qur'ān equated *zinā* to any gravely immoral act and thus mandated punishment or homosexual sodomy, or alternatively, that the word *zinā* encompassed male–male sexual interactions as well as male–female sex offenses.²²¹ Whereas Shāfi'īs saw clarity, Ḥanafīs saw ambiguity, and their doubt was enough to take sodomy out of the realm of *ḥudūd* laws.²²²

In this debate, the jurists focused on the scope of identifiable, agreed-upon Qur'ānic texts that clearly forbade *zinā* but were silent or needed construction to extend to acts of sodomy.²²³ Instances of ambiguity increased in the realm of *ḥadīths*, where jurists could rarely point to agreed-upon authoritative texts. Islamic law has a

217. In general, Muslim jurists regarded legal texts to be ambiguous when statements of general import engendered uncertainty as to whether and how the law regulated a new set of facts. This may occur when the law was silent, the scope of an existing and possibly related ruling was insufficiently clear, or where there were actual conflicts between two texts commanding two contradictory rulings. MUṢṬAFĀ MUḤAQQIQ DĀMĀD, 4 QAVĀ'ID-I FIQH 54 (1999).

218. For general legal treatments of sodomy in Islam, see CHRISTIAN LANGE, JUSTICE, PUNISHMENT, AND THE MEDIEVAL MUSLIM IMAGINATION 199–214 (2008); KHALED EL-ROUAYHEB, BEFORE HOMOSEXUALITY IN THE ARAB-ISLAMIC WORLD, 1500–1800, at 118–28 (2005); Arno Schmitt, *Liwāt im Fiqh: Männliche Homosexualität*, 4 J. ARABIC & ISLAMIC STUDS. 49–110 (2001–2002).

219. See ABU AL-ḤUSAYN AL-QUDŪRĪ, 11 TAJRĪD 5910–16 (Muḥammad Aḥmad al-Sirāj & 'Alī Jumu'a Muḥammad eds., 2004).

220. *Id.*

221. See GHAZĀLĪ, *supra* note 131, at 440; ABŪ AL-QĀSIM AL-RĀFI'Ī, AL-'AZĪZ SHARḤ AL-WAJĪZ 139–41 ('Alī Muḥammad Mu'awwaḍ & 'Ādil Aḥmad 'Abd al-Mawjūd eds., 1997); YAḤYĀ B. SHARAF AL-NAWAWĪ, RAWḌAT AL-ṬĀLIBĪN 309 ('Alī Muḥammad Mu'awwaḍ & 'Ādil Aḥmad 'Abd al-Mawjūd eds., 1992).

222. For detailed Ḥanafī responses to Shāfi'ī arguments in favor of counting sodomy as a *ḥadd*, see QUDŪRĪ, *supra* note 219, at 5910–16. Worth noting is that, though Ḥanafīs generally dropped the *ḥadd* punishments, most regarded public male sodomy as immoral and thus punishable at the discretion of the caliph. See ZAYN AL-DĪN IBN NUJAYM, 5 AL-BAHR AL-RĀ'IQ 17 (1893).

223. Shī'ī law did not face the problem of ambiguous texts in its unequivocal prohibition of *zinā*; it cited a body of *ḥadīths*, consensus, and rational argumentation to the effect that if *zinā* was forbidden and had a *ḥadd* punishment, sodomy—which they regarded as a graver moral offense—should be punished even more harshly. See, e.g., ABŪ JA'FAR AL-ṬŪSĪ, 2 AL-NIHĀYA FĪ MUJARRAD AL-FIQH WA'L-FATĀWA 723–24 (1963); al-Sharīf al-Murtaḍā, *Intiṣār*, in 23 SILSILAT YANĀBĪ' AL-FIQHIYYA 49–50 ('Alī Aṣghar Murwārīd ed., 1990); Muḥammad b. Nu'mān al-Mufīd, *Muqni'a*, in 23 SILSILAT YANĀBĪ' AL-FIQHIYYA 3 ('Alī Aṣghar Murwārīd ed., 1990).

problem of sources: in the realm of *ḥadīth* there was much disagreement about which texts were authoritative and normative bases for law.²²⁴ Even when the textual source-critics accepted the authenticity of *ḥadīth*, there was disagreement as to how jurists ought to resolve conflicts between them.²²⁵ Without a unified authoritative corpus of *ḥadīth* or a single code of law, each school of law addressed such questions through elaborate rules of interpretation particular to their own hermeneutical principles that they thought remained most faithful to the constitutional texts.

In this context, Sunnī jurists saw ambiguity in the very interpretive differences about the law between the legal schools.²²⁶ This category of “interpretive ambiguity” underscores the extent to which these jurists viewed Islamic law as a juristic construct that accommodates a generous notion of legal pluralism: any rule that is valid in one Sunnī school is to be recognized as a valid legal rule.²²⁷ In that vein, they sought to distinguish areas subject to extensive interpretation and debate. For them, Islamic law fell into two categories—clearly established rules and debatable rules.²²⁸

Clearly established rules are law so widespread that they can be presumed to be a matter of common knowledge in a given society or legal regime.²²⁹ Everyone in a Muslim society should know, for example, that Islamic law prohibits sex outside of marriage.²³⁰ In the earliest moments of the Muslim community, it was possible for new converts to claim that they were unaware of this prohibition, as occurred in a case during the time of the second caliph, ‘Umar. The caliph ruled that a Yemeni man who committed a sex crime but

224. See Mottahedeh, *supra* note 66, at 10–13.

225. *Id.*

226. This is a doctrine adopted by the Shāfi‘ī and Mālikī schools. Whereas for Mālikīs, the fact of juristic disagreement on matters well-established in another school is enough to give rise to a *ḥadd*-averting doubt, the Shāfi‘ī recognition is qualified. To recognize rules that go against their school’s mainstream positions, Shāfi‘īs require a firm legal basis that would meet muster according their interpretive methods. That is, if a Shāfi‘ī jurist examined the legal sources relied upon by other jurists for divergent opinions, he need only recognize them as valid if those conclusions rest on logic so convincing that they suggest themselves easily to an astute Shāfi‘ī jurist’s mind. See, e.g., ABŪ AL-FAYḌ AL-MAKKĪ 2 AL-FAWĀ’ID AL-JANIYYA ḤASHIYAT AL-MAWĀHIM AL-SANIYYA SHARḤ AL-FAWĀ’ID AL-BAHIYYA, 133–34 (Ramzī Sa’d al-Dīn al-Dimashqī ed., 1991); IBN ‘ABD AL-SALĀM, *supra* note 209, at 279–80.

227. See SHERMAN A. JACKSON, ISLAMIC LAW AND THE STATE: THE CONSTITUTIONAL JURISPRUDENCE OF SHIHĀB AL-DĪN AL-QARĀFĪ 142 (1996) (quoting the definition of legal pluralism advanced by thirteenth-century Egyptian jurist Shihāb al-Dīn al-Qarāfi: “the ability to countenance the plurality of equally authoritative legal interpretations”).

228. E.g., QARĀFĪ, *supra* note 150, at 1309 (noting that the first category means presumed, not actual, knowledge—as indicated by its label, *mashhūr*, meaning widespread or common).

229. *Id.*

230. *Id.*

claimed not to know that it was illegal was eligible for the *ḥadd* punishment only if he knew that the act was prohibited.²³¹ The implication is that the man's lack of awareness was plausible, as Yemen was on the margins of the community at a time when Islamic laws were not widespread.²³² Some jurists took 'Umar's ruling as the basis for a *mens rea* requirement, which coincided with their understandings of the *ḥudūd* maxim.²³³ But more generally, jurists determined that Islamic law's clear prohibitions against *zinā* very quickly became sufficiently widespread that they fell into the category of clearly established rules.²³⁴ Thus, a thirteenth century jurist ruled that a couple claiming confusion about the legality of sex before marriage when they *planned* to get married did not constitute the type of ambiguity that would avert a *ḥadd* punishment; the prohibition against extra-marital sex had already been clearly established.²³⁵ In this area of clearly established rules, courts did not generally entertain claims of ambiguity.²³⁶

"Debatable rules" refers to the detailed technical rules that have been the subject of juristic differences and comprise most of Islamic law. "Only astute jurists can discern these rules," one jurist explained, and even then, they often disagree.²³⁷ Muslim jurists have always acknowledged the probabilistic nature of the interpretive endeavor and tried to account for it in various ways.²³⁸ In criminal law, a central way of doing this was through the elaboration of the

231. See IBN NUJAYM, *supra* note 222, at 4.

232. *Id.* The implication is that the ability to claim *ḥadd*-averting doubt by way of ignorance about *zinā* prohibitions was limited to the first generations; Islamic prohibitions against *zinā* very quickly became sufficiently widespread that they fell into the category of clearly established rules. See also IBN QUDĀMA, *supra* note 194, at 345; cf. PAUL R. POWERS, INTENT IN ISLAMIC LAW: MOTIVE AND MEANING IN MEDIEVAL SUNNĪ FĪQH 193–94 (2006) (discussing how *shubḥa* presents a problematic legal principle, as it in effect means "the law only applies to those who have knowledge of the law").

233. Prominent Ḥanafī jurists, including Ibn Māzah, 'Aynī, and Ibn 'Ābidīn, imposed a knowledge requirement for *zinā*-liability based on 'Umar's judgment, with Ibn 'Ābidīn specifying that to impose a *ḥadd* would contravene the requirements of the *ḥudūd* maxim. But other prominent Ḥanafīs rejected this view, holding that claims of ignorance were never appropriate in cases of sex offenses because all religions and communities had outlawed it. Ibn Nujaym took a strict-liability approach, holding that *ḥudūd* punishments applied whenever *ḥudūd* laws were violated, regardless of publication of the law or the offender's knowledge. For competing positions, see IBN NUJAYM, *supra* note 222, at 4.

234. See IBN QUDĀMA, *supra* note 194, at 345.

235. QARĀFĪ, *supra* note 150, at 1309.

236. Rabb, *supra* note 126, at 306.

237. QARĀFĪ, *supra* note 150, at 1309.

238. This insight is the major contribution of Aron Zysow, Economy of Certainty 90–91, 459–62 (1984) (unpublished Ph.D. dissertation, Harvard University) (on file with Harvard University Library Archives).

hudūd maxim and an accompanying doctrine of doubt.²³⁹ Here, textual ambiguity to jurists means non-liability for the average person, and jurists imposed a high burden of clarity before allowing criminal liability.²⁴⁰ In other words, if even jurists could reasonably disagree about the substance of the law, then “ignorance is an excuse (for the layperson).”²⁴¹

Consider the interpretive difference concerning valid forms of marriage. Islamic law initially allowed “temporary marriages,” which Sunnī schools later deemed illegal.²⁴² These are marriage contracts wherein the couple specifies a date upon which the union will dissolve automatically, without divorce proceedings.²⁴³ Jurists agreed that the Prophet permitted this form of marriage during his lifetime, but disagreed as to whether the practice was subsequently outlawed.²⁴⁴ Sunnī jurists concluded it was outlawed, but there is evidence that temporary marriages continued well into the first century, indicating that any prohibition must have occurred through some means beyond the ordinary foundational sources.²⁴⁵ Nevertheless, the Sunnī jurists came to a consensus by the mid-eighth century that temporary marriages were unlawful.

The disputed status of this form of marriage could have stiff consequences in criminal law because sexual relations in an invalid marriage opens parties up to criminal liability for *zinā*—where penalties range from flogging to death.²⁴⁶ Jurists invoked the *hudūd* maxim in such cases on the notion that, to impose criminal sanctions given the interpretive ambiguity about the legal status of temporary marriages would amount to not giving fair notice to non-jurists who entered into such contracts.²⁴⁷ Most jurists announced a general rule that any law deemed valid in one school would be construed as an ambiguity that absolves the accused of possible criminal liability in

239. JALĀL AL-DĪN AL-SUYŪTĪ, *AL-ASHBĀH WA’L-NAZĀ’IR* 237 (Muḥammad al-Mu’taṣim bi’llāh al-Baghdādī, 1998) (defining doubt as interpretive differences, which produce rules that “are legal according to some jurists but illegal according to others”).

240. QARĀFĪ, *supra* note 150, at 1309.

241. *Id.* (emphasis added).

242. The Meccan School of Ibn ‘Abbās sanctioned it, as did the proto-Shī’a in Medina and Kūfa. See Wilferd Madelung, *‘Abd Allāh Ibn ‘Abbās and Shī’ite Law*, in *PROCEEDINGS OF THE EIGHTEENTH CONGRESS OF THE UNION EUROPÉENNE DES ARABISANTS ET ISLAMISANTS: LAW, CHRISTIANITY AND MODERNISM IN ISLAMIC SOCIETY* 15–16, 23–25 (1998).

243. *Id.*

244. *Id.*

245. *Id.*

246. See PETERS, *supra* note 74, at 59–62 (detailing the range of punishments imposed for *zinā* under different schools of thought).

247. Rabb, *supra* note 126, at 308.

another.²⁴⁸ To do otherwise would be to impose criminal liability where the perpetrator did not have clear notice that his actions were proscribed, in an area where even the jurists could not agree on the meaning of the law.

2. Mistake of Law or Ignorance Can Be an Excuse

Mistake of law covers cases where the law is clear (to the jurist) but confused in the mind of the layperson.²⁴⁹ The reasonableness of the mistake differs by school, along with the requirements that jurists impose for exercising due diligence to ascertain the law before claiming mistake or ignorance.²⁵⁰ But most insisted that to be reasonable, a person must have had some *textual* basis for thinking that an act was legal that was actually illegal.²⁵¹ Such circumstances usually arose in cases of apparent conflicts of texts. An oft-repeated example in the sources was the case of a father taking his son's property on the mistaken belief that he was entitled to do so. The texts are clear, as the jurists understood them, that he had no such entitlement.²⁵² Yet, a prophetic statement to the effect that "a son and his property belong to (or are under the care of) his father" could provide a basis for a father's belief—albeit mistaken—that it is perfectly legal to take his son's property.²⁵³ In such cases, where the father lacked both knowledge of the actual law and criminal intent to

248. *E.g.*, QARĀFĪ, *supra* note 150, at 1307 (applying the *ḥudūd* maxim to a disputed type of marriage that Ḥanafīs validate in which a woman gets married without the permission of her guardian).

249. *See, e.g.*, IBN NUJAYM, *supra* note 182, at 128.

250. Ḥanafīs imposed very thin diligence duties, finding ambiguity where a person had a reasonable basis for believing that an illegal act is legal, and applying the *ḥudūd* maxim to drop the associated punishment. In such instances, to be reasonable, the belief had to have simply rested upon some textual basis, even if all jurists agreed that the individual interpretation was incorrect. *See, e.g.*, QUDŪRĪ *supra* note 219, at 5899–900 (describing duties of due diligence before the maxim applies). Shāfi'īs and Mālikīs similarly required a textual basis, but counted rules arising from interpretive disputes amongst jurists as texts. *See, e.g.*, QARĀFĪ, *supra* note 150, at 1307–09; IBN 'ABD AL-SALĀM, *supra* note 209, at 279–80. Shī'ī jurists sharply distinguished between objective ambiguity (in the mind of the jurists) and subjective ambiguity (in the mind of individual legal agents), placing emphasis on the former for legal recognition in invoking the *ḥudūd* maxim and applying thick standards of diligence on the latter. *See* MUḤAQQIQ DĀMĀD, *supra* note 217, at 54–61; MUḤAMMAD AL-FĀḌIL AL-LANKARĀNĪ, AL-QAWĀ'ID AL-FIQHIYYA 21 (1995).

251. For an example in Mālikī law, see for example IBN RUSHD II, *supra* note 131, at 261–62.

252. *Id.*

253. For discussions in the legal literature with citations to this *ḥadīth* (*anta wa-māluk li-abik*), see AḤMAD B. ḤANBAL, 2 MUSNAD nos. 179, 204, 214 ('Abd Allāh al-Darwish) (*ḥadīth* citation); IBN NUJAYM, *supra* note 222, at 13 (Ḥanafī discussion); QARĀFĪ, *supra* note 148, at 1309 (Mālikī discussion); SUYŪṬĪ, *supra* note 239, at 237 (Shāfi'ī discussion); IBN IDRĪS, *supra* note 172, at 486 (Shī'ī discussion).

violate the law, and instead relied on his mistaken belief of legality, jurists applied the *ḥudūd* maxim to avert the *ḥadd* punishment for theft.²⁵⁴

Mere ignorance of the law could also be an excuse, as we saw in the case of the Yemeni Muslim convert living on the periphery of the central Muslim lands, who escaped *ḥadd* liability for a sex crime by claiming not to know it was illegal. For Sunnī jurists, the accommodation of ignorance was pragmatic and equitable. As one jurist put it, the *ḥudūd* maxim meant that judges should entertain claims of ignorance in areas of debatable rules, because the law was often too complex to expect that a layperson could or would be aware of its details.²⁵⁵ Where even jurists could not agree as to the contours of the law, there was ambiguity, and it would be unfair to punish individuals for violating ambiguous rules.²⁵⁶ For Shī'ī jurists, who did not recognize interpretive ambiguity in the Sunnī system of multiple-school pluralism, applying the *ḥudūd* maxim on the basis of claims of ignorance is also an acknowledgement that there will be cases where even expert jurists cannot ascertain the law. They too maintained that it would be unfair to punish an individual offender where he simply had no notice of the law after exercising duly diligent attempts to ascertain it.²⁵⁷

These same jurists of course took pains not to allow this principle to translate into complete disregard of the law, by evaluating the individual claims of ignorance for plausibility.²⁵⁸ A criminal offense committed out of ignorance meant that the individual lacked the requisite intent to be charged with criminal culpability.²⁵⁹ Jurists thus added that the maxim should apply to *reasonable* claims of ignorance.

254. See *supra* note 250.

255. QARĀFĪ, *supra* note 150, at 1309.

256. *Id.*

257. Shī'ī jurists distinguished between the person who is ignorant of the law but has made a good faith effort to ascertain it, and the one who has made no such effort. Only those who made a good faith effort or who lived far away from the centers of knowledge would have a *bona fide* claim of ignorance that would avert punishment for commission of the *ḥadd* crime. Others who could have asked an expert (*mujtahid*) but failed to do so out of willful blindness are deemed negligent, especially when acting in questionable areas that might implicate criminal liability; they are taken to have constructive notice of the law. See MUḤAQQIQ DĀMĀD, *supra* note 217, at 54–55, 57.

258. See, e.g., IBN RUSHD II, *supra* note 131, at 262–33 (listing cases where the *ḥudūd* maxim does not apply because there has in fact been no reliance on a legal ambiguity; that is, where the offender knew he was violating the law, and thus could not claim ignorance).

259. See, e.g., MAKKĪ, *supra* note 226, at 137 (Shāfi'ī statement); QARĀFĪ, *supra* note 150, at 1307 (Mālikī statement).

3. Mistake of Fact Can also Be an Excuse

As for mistake of fact, consider this example.²⁶⁰ Islamic law unambiguously prohibits wine consumption.²⁶¹ What happens if a person finds a reddish liquid in front of her? If she has strong reason to believe that the liquid is juice rather than wine, even if she is mistaken, the maxim applies and no punishment is due.²⁶² But if she is unsure what the liquid is, the maxim does not apply until and unless she has made diligent attempts to ascertain what the beverage is.²⁶³ Here too, there is no sinful or criminal intent; the mistake creates a doubt of the type to which the maxim applies to bar punishment.²⁶⁴

C. Fault Lines: Strict Liability and Public-Moral Values

Ambiguity did not always produce the benefit of *ḥudūd* avoidance. Jurists of some schools argued in favor of strict liability for certain crimes, where the values at stake were so fundamental, they argued, that the *ḥudūd* maxim could not apply. In such cases, they advocated punishment regardless of mistake or lack of notice. Typically, these instances dove-tailed with clearly established rules, which tended to manifest the Muslim community's closely held moral values and social norms.

1. Consensus Cases of Strict Liability

Jurists agreed that the *ḥudūd* maxim would not apply to absolve liability from perpetrators of proved instances of rape.²⁶⁵ They indicated that no amount of claimed ignorance of the law could avert *ḥadd* liability from the perpetrator because of the gravity and the immorality of the crime and its violation of the private interests of the victim.²⁶⁶ The inverse was also true: the *ḥudūd* maxim did apply

260. Factual uncertainty arises when an individual is unaware that a known legal rule applies to a particular set of facts. See MUḤAQQIQ DĀMĀD, *supra* note 217, at 55. But in some instances, factual uncertainty may give rise to legal uncertainty as well. For example, when the law imposes a duty only if certain conditions are met, uncertainty as to whether the condition has been realized engenders uncertainty as to whether the law imposes a duty in the first place. See MUḤAMMAD BĀQIR AL-ṢADR, *DURŪS FĪ 'ILM AL-UṢŪL* 386–88 (1998).

261. See QUR'ĀN 5:90.

262. See, e.g., QUDŪRĪ, *supra* note 219, at 5899 (Hanafī positions); QARĀFĪ, *supra* note 150, at 3107 (Mālikī positions); GHAZĀLĪ, *supra* note 131, at 444 (Shāfi'ī positions).

263. See *supra* note 260.

264. IBN 'ABD AL-SALĀM, *supra* note 209, at 279.

to the rape victim, as the lack of voluntariness was conceived as a *ḥadd*-averting doubt akin to the lack of *mens rea*.²⁶⁷ During the reign of the second caliph, 'Umar averted the *ḥadd* sanction from a woman accused of *zinā* who claimed to have been sleeping and awoke to find a man atop her.²⁶⁸ He determined the case to be one of rape, which lifted criminal culpability from the woman and imposed it strictly on the man (though the man was no longer to be found).²⁶⁹ In the same way, jurists drew a red line around rape as a crime of strict liability. The prohibition against it was a well-established rule that all legal agents were presumed aware of and charged with respecting. Thus, jurists rejected any room for applying the *ḥudūd* maxim in these cases.

2. Against Contracting Ambiguity

Most jurists also imposed a rule of strict liability on couples who were legally forbidden from marrying each other—such as siblings—but did so anyway.²⁷⁰ The founder of the Ḥanafī school, Abū Ḥanīfa, attempted to counter that rule by proposing another type of doubt: contractual ambiguity. He held that legal permissions ordinarily flowing from a valid contract created a *ḥadd*-averting doubt when a contract was materially defective.²⁷¹ He applied this rule even where contracting parties entered into a contract *knowing* of the material defect.²⁷² Whereas other jurists saw such marriage contracts as void, Abū Ḥanīfa saw them as voidable; for him, they created at least the *semblance* of a contract.²⁷³

265. Jurists uniformly avoided the *ḥadd* penalty when it came to rape victims, on the basis of the *ḥadīth* in which the Prophet reportedly said that members of his community are not liable for matters arising from coercion. See IBN QUDĀMA, *supra* note 194, at 347–48 (citing the Sunnī version of the *ḥadīth*: “My community is not liable for [consequences arising from] mistake, forgetfulness, or coercion.”); AL-WAḤĪD AL-BIḤBAḤĀNĪ, AL-RASĀ'IL AL-UṢŪLIYYA 354 (1996) (citing the Shī'ī version of the *ḥadīth*: “My community is not liable in nine situations... [among them], mistake, forgetfulness, coercion, ignorance, and incapacity.”); MURTAḌĀ AL-ANṢĀRĪ, AL-RASĀ'IL AL-JADĪDA WA'L-FARĀ'ID AL-ḤADĪTHA 154 ('Alī Mishkīnī al-Ardabīlī ed., 1971) (same).

266. See *infra* note 270.

267. IBN QUDĀMA, *supra* note 194, at 347.

268. QUDŪRĪ, *supra* note 219, at 5908–09.

269. *Id.*

270. Many dispense with a *mens rea* requirement here, indicating the moral value they place on this rule. See IBN QUDĀMA, *supra* note 194, at 341 (citing late-second- to mid-third-century jurists Abū Yūsuf, Muḥammad al-Shaybānī, Ishāq Ibn Rāḥawayh, and others for the rule).

271. See IBN NUJAYM, *supra* note 182, at 128.

272. *Id.*

273. Ordinarily, the Islamic law of contract provides some protection for defective commercial transactions pursued on the mistaken belief that they were done under color of a contract, that is, where there was a semblance of a valid contract. Abū Ḥanīfa extended this norm to marriage law in his position that the semblance of a

This example illustrates how, in Ḥanafī law, a single case could have two aspects—one criminal and the other commercial—and is thus governed by two sets of laws with differing legal outcomes. The commercial aspect validates such relations whenever there is a contract, or, according to Abū Ḥanīfa, the semblance of one.²⁷⁴ In such cases, Abū Ḥanīfa privileged contract law, using it to find semblances that he could then equate the legal doubt necessary to avoid punishment in criminal law. The effect was to avert the *ḥadd* punishment in all cases involving contracts, however knowingly defective.²⁷⁵ Yet, this effort to privilege the law of contract over other values ultimately failed. Most jurists, even subsequent Ḥanafīs of Abū Ḥanīfa's own school, rejected his arguments.²⁷⁶ For them, adjudication on the mere basis of the sanctity of private agreements had to fit within, rather than override, Islamic law's overarching fundamental values. Most jurists found the value Abū Ḥanīfa placed on private property insufficiently compelling to trump competing family values.

3. Expressing Values: Structure and Substance

This examination of *ḥudūd* laws has uncovered some of the value commitments articulated by Muslim jurists. Though the Islamic approach to criminal law interpretation displays significant similarities to the Anglo-American tradition (especially in the broad commitments to fairness and equity), my goal is not to equate the content of those value commitments. Rather, the aim is to identify ways in which *ḥudūd* laws operated with respect to a complex set of public-moral values in the Islamic context and what that might say

marriage contract should provide protection as well, in this case, exculpating parties from accusations of *zinā*. See *id.* at 128.

274. See, e.g., AL-'ĀLIM B. AL-'ALĀ' AL-ANṢĀRĪ, 5 AL-FATĀWĀ AL-TĀṬARKHĀNIYYA 108–16 (Sajjād Ḥusayn ed., 1990) (discussing the differences in the chapters on commercial law and the chapters on criminal law).

275. Further examples of instances in which Abū Ḥanīfa barred punishment despite clear Islamic legal prohibitions against certain acts, include the following: sexual relations with a slavewoman held as security and contracts for the sale of wine. See, e.g., MUḤAMMAD AMĪN IBN 'ĀBIDĪN, 12 AL-RADD AL-MUḤTĀR 'ALĀ 'L-DURR AL-MUKHTĀR 61–84 ('Alī Muḥammad Mu'awwaḍ & 'Ādil Aḥmad 'Abd al-Mawjūd eds., 1994–1998); QĀDĪ KHĀN AL-ŪZJANDĪ, 3 FATĀWĀ 480–89 (Sālim Muṣṭafā al-Badrī ed., 2009); ANṢĀRĪ, *supra* note 274, at 108–16; IBN NUJAYM, *supra* note 222, at 16.

276. Only a minority of later Ḥanafīs followed Abū Ḥanīfa's views of “contractual doubt,” often implicitly. Examples include QUDŪRĪ, *supra* note 219, at 5901–07 (implicit definition) and KĀSĀNĪ, *supra* note 190, at 4150 (explicit definitions). Many Ḥanafīs, beginning with Abū Ḥanīfa's two most prominent students, Abū Yūsuf and Shaybānī, objected. See IBN NUJAYM, *supra* note 182, at 128 (noting disagreement with Abū Ḥanīfa's rule of *ḥadd*-avoidance by claiming reliance on a contractual ambiguity despite knowledge of the identity of the prohibited partner and the illegality of the marriage).

about the law's value commitments and related interpretative scheme. To that end, the study also revealed interpretative processes at the core of Islamic criminal law, showing how jurists worked out the theories of criminal law through discussions and applications of the *hudūd* maxim—"the Islamic rule of lenity."

In the process, it should have become apparent that premodern Muslim jurists formally saw themselves bound to the dictates of a divine Lawgiver through foundational legal texts, with an absolute form of legislative supremacy and constrained judicial discretion in criminal law. At the same time, in applications of the law on the ground, these same jurists applied equitable principles based on overarching public-moral values also contained in the Lawgiver's foundational texts. Though they tended toward opposite *outcomes*, both maneuvers were efforts to vindicate an idea of absolute legislative supremacy. Jurists took the theoretical mandatoriness of the *hudūd* law regime outlined in constitutional texts to underscore the set of moral values on which they focused in actual application. With this in mind, they deployed the *hudūd* maxim not quite as an exception to criminal law rules, but as a corollary, rooted in provisions from Islamic legal precepts in the constitutional texts requiring fairness and equity.

V. CONCLUSION

These interpretive processes—as revealed not only in texts but also in the way jurists deployed lenity on the ground—carry profound implications for understanding legal processes in Islamic and American law. In the Islamic legal process, the *hudūd* maxim reveals much about the institutional structure and core values underlying the legal system called *sharī'a* as it operated historically. The maxim also discloses the presence of equity and limits on judicial restraint placed on Muslim jurists wielding interpretative authority over the law. In that context, legislative supremacy took on a meaning qualified by the core values affecting the extent to which judges superimposed equity concerns onto textual interpretations otherwise bound to rules of legislative supremacy. The lack of separated powers or formal legislators beyond the initial Lawgiver explains jurists' emphasis on values expressed in foundational texts. It also explains the centrality of jurists to legal interpretation and adjudication in the context of Islam's multiple legal schools. In that vein, their inability to update the law formally manifested in a reliance on legal canons like lenity to define law and guide discretion in a vastly expanded judicial role.

Contrast this with the lenity rule in the American legal tradition. It too reveals core aspects of constitutional structures and values undergirding American legal theory. In American legal

process, the lenity rule appears a bellwether for how individual judges understand the Judicial Power. For textualist judges, like Justice Scalia, using lenity as a principle of equity is illegitimate because it compromises strong rules of legislative supremacy and judicial deference in criminal law. Indeed, for him and other lenity proponents, equity need not enter the equation directly; textualism and judicial deference is enough. Where lenity must act as a constraint on judicial discretion, benefits may accrue to criminal defendants coincidentally to the motivating force behind the rule. Use of American lenity in that respect is quite opposite its use and effect in the Islamic legal context—despite *sharī'a*'s more robust insistence on absolute legislative supremacy.

This historical and comparative study of lenity significantly informs our understandings of public law theory governing institutional relations and the scope of judicial discretion in criminal law. American lenity, as we know from the historical sources and judicial applications, is a recognizably judge-made principle of uncertain influence in the American constitutional and statutory interpretative scheme. Judges invoke lenity unevenly when approaching doubt-ridden legal texts to help guide or justify the extent of their own adjudicative choice. American jurists who champion lenity do so primarily out of nondelegation rationales.²⁷⁷ Islamic lenity, as revealed from the historical and legal sources, is a judge-made rule too. But Muslim jurists largely obscured that fact once they deemed the lenity rule a text on par with other divine legislation. To be sure, their decisions to apply the rule were guided by the multiple legal schools' distinctive methodologies and a common law-like notion of precedent within each. Moreover, they approached criminal law decisions with similar motivations to those underlying American structural views of lenity—a strong ideal of legislative supremacy, particularly over criminal law. Yet, because they had constructed a lenity doctrine that authorized them to expand the scope of their own discretion at the same time that they claimed fidelity to the texts and to legislative sovereignty concerns, Muslim jurists were able to explicitly rely on both equitable and nondelegation rationales to justify their decisions. The practical effect is this: whereas American lenity has become a fraught and limited tool ostensibly of judicial self-restraint, Islamic lenity emerged as a relatively uncontroversial and expansive tool used to justify and guide the exercise of judicial discretion in criminal law. In this way, lenity jurisprudence—inasmuch as it exemplifies the operation of legal canons in American and Islamic criminal law traditions—

277. In a separate project beyond the scope of the present study, a survey of U.S. Supreme Court decisions suggests that the nondelegation view of American lenity contends with other interpretations and disparate applications of the rule.

reflects and helps explain important differences in the scope of judicial discretion in these comparative public law contexts.
